THE CUMULATIVE LOOSE-LEAF BUSINESS ENCYCLOPEDIA

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VOLUME X

Book II

COMMERCIAL LAW

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In Ten Volumes

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COMMERCIAL LAW

BOOK II

COMMERCIAL LAW

BOOK II

SALES

Elements of Valid Sale—Parties—Conditions and Warranties—Performance—Delivery—Fraud and Mistake—By Agents—Uniform Sales' Act.

THERE are innumerable questions of importance which arise out of a sale of personal property which were not discussed under the general subject of contracts heretofore appearing. It will therefore be our object to obtain a practical knowledge of the principles upon which the law of sales is based.

A sale has been judicially defined as a contract to pass rights of property for money which the buyer pays or promises to pay to the seller for the goods bought. To constitute a valid sale there must be a concurrence of the following elements: (1) Parties competent to contract; (2) mutual consent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer, and (4) a price in money paid or promised. It is important before analyzing the elements of a sale to distinguish this species of contract from a bailment, lease, and an exchange or barter. If the identical property delivered is to be restored again to the original owner, the relation established is one of bailment; if not, a sale is made. However, the delivery of personal property with the right to return the same is not always a bailment. The distinction depends upon whether title has passed upon delivery of the goods.

To illustrate, if John Doe delivered goods to Richard Roe with the understanding that if satisfactory he is to retain them, the contract is one of bailment. When Richard Roe elects to keep the goods the contract becomes a sale. The contract would be construed as a sale if Richard Roe kept the goods beyond a reasonable time. If John Doe agrees to a present transfer of the absolute title in personal property to Richard Roe, with the privilege of returning them if not satisfactory, a sale would be consummated. Where an agreement, while it is designated an option, provides for the absolute transfer of shares of stock to the assignee, who is during the continuance of the so-called option to pay interest on the purchasing value of the stock, and if he refuses to purchase, is to assign to the original assignor, the agreement, if carried out, is a sale subject to rescission by the vendee, and if it is not rescinded he is liable for the purchase price.

The difference between a lease and a sale resides in the fact that the former is only a temporary transfer of possession, while the latter is an absolute transfer of title. This question most frequently arises in cases where pianos and sewing machines are delivered under contracts providing for instalment payments in the nature of rental, and, further, that the property shall vest in the *user* upon payment of the last instalment. Such contracts are sales, and not leases, regardless of what the parties may term them, but such a transaction may be made a lease if the contract contains an express proviso that the title shall not pass until the last payment has been made. If such class of goods are hired in good faith, with the privilege of purchasing at a stated price in addition to the periodical payments, a lease is made, which, upon the exercise of the option to purchase, is converted into a sale.

If goods are "consigned" for sale, it is a bailment and not a sale to the consignee; the goods do not become his property or liable to be attached by his creditors. The fact that the goods consigned were invoiced at a stated price does not constitute the transaction a sale, unless the terms of the consignment be such as to make the consignee, when the goods are sold, the purchaser and principal debtor for the goods.

In Pennsylvania a chattel mortgage is invalid, but in New Jersey and many other states a mortgage of personal property will be enforced. The distinction between a sale and a chattel mortgage is that in the latter there is but a conditional transfer of title to secure a debt, while in the former the transfer and possession are absolute.

A consideration paid or to be paid is essential to a sale. In the case of a gift, a transfer of personal property is made for what is known technically as a "good" consideration, such as love, affection or charity. In the case of a sale a money consideration must exist.

The question has frequently arisen whether or not a particular transaction is a sale or a mere barter or exchange of goods. In a well-known case B had in his possession a quantity of coin which he believed to be current money of a foreign country, and offered it to A for the purchase of certain goods. A, being ignorant of its value, asked time for inquiry, and having taken several days for that purpose, during which he satisfied himself on the subject, delivered to B a quantity of goods for which he received the coin. After keeping the coin three years A discovered that it was no good, after which he brought suit against B for the price of the goods sold and delivered. The court held that the transaction was an exchange and not a sale of goods, and

consequently A had no right of recovery. If the money paid was counterfeit, the debt for goods bought would not be discharged, but when the seller has examined and accepted foreign coin at the time of the bargain, it cannot be denied that he received what he bargained for. The current coin of the country may, by express agreement of the parties, be taken at the risk of the seller. If the consideration for the transfer of personal property is a price in money, or if the value of the goods is determined by a price fixed in money, the transaction is a sale. If no price is fixed a barter or exchange results. For example, if the consideration for delivering twenty pounds of coffee at thirty cents per pound is fifty pounds of sugar at ten cents per pound, the transaction is a sale. If, however, the transaction was made on the basis of delivering twenty pounds of coffee for fifty pounds of sugar, it would be a barter or exchange.

It will be observed from the above remarks that there are many transactions which involve more or less conveyances of an interest in personal property, but they are not sales unless they are present transfers of the entire title for a legal consideration.

Parties to the Contract of Sale.

The competency of a party to enter into a valid contract has been considered under contracts, and it will therefore suffice in the present connection to state that infancy, insanity and intoxication will render a party incompetent to enter into a valid contract of sale. No man can sell goods and convey a valid title to them unless he is the owner or lawfully represents the owner. A person, therefore, however innocent, who buys goods from one not the owner, obtains no property in them whatever, and even if in ignorance of the fact that the goods were lost or stolen, he resells them to a third person in good faith, he remains liable to the original owner. A man may make a valid agreement to sell goods or property not yet his, and even goods not yet in existence.

The essential parties to a valid contract of sale are the vendor (seller) and the vendee (buyer). There must be a clearly defined offer on the one hand and an acceptance of that same offer on the other hand. In other words, the minds of the parties must meet; there must be mutuality of assent. The following illustration will emphasize this point: A wrote to B making an offer to sell a cargo of good barley. B replied accepting such offer, but added that he expected to receive fine barley and full weight. A wrote back, "You say you expect fine barley. Upon reference to my letter you will find no such expression.

As such I must decline shipping the same." Good barley and fine barley are terms well known in the trade, and fine barley is the heavier of the two. There was no valid acceptance of the original offer and hence no contract of sale. Every merchant, dealing either personally, by agent or through correspondence, should exercise care in seeing that the terms of either an offer or acceptance of a contract of sale are not ambiguous or unintelligible. It should be borne in mind that where the acceptance of an offer is made by either letter or telegram, the contract is complete as soon as the letter or telegram of acceptance is deposited in the mails or telegraph office, and further that where the offer is communicated by letter and the acceptance by telegram, the acceptance is not complete until the offeror has received notice of such acceptance.

A mistake by the buyer of the goods in supposing that the article bought by him will answer a certain purpose for which it turns out to be unavailable, is not a mistake that would afford grounds for pretending that he did not assent to the bargain.

A mistake as to the person with whom a contract of sale is made may or may not avoid the sale. In the common case of a trader who sells for cash it can make no possible difference to him whether the buyer be Harrigan or Jones, and a mistake of identity would not avoid the contract. In some cases the question of identity is an important element in the sale, as, for example, if the sale be on credit, where the solvency of the buyer is the chief motive which influences the assent of the vendor, or when the purchaser buys from one whom he supposes to be his debtor and against whom he would have the right to set off the price, a mistake as to the person dealt with under such circumstances would prevent the valid formation of a contract of sale on the ground of absence of assent. Assent may be implied by the conduct of the contracting parties, as by a nod, gesture, or even silence, under certain circumstances.

An agreement that an offer shall be left open for acceptance for a stipulated time is known as an option, which must be supported by a valuable consideration. If so, the offer cannot be withdrawn or retracted during the time for which the option was to run. If the offer be withdrawn before the expiration of the option damages can be recovered by the injured party.

The Subject of Sale.

Anything recognized as property may be sold, and as a general rule such property must be in actual or potential existence and must be definitely described and separated from a mass.

By potential existence of property is meant a hope or expectation of having property to sell, founded on a present right of possession. For example, a man may sell the crops to be grown in his field or the unborn young of his flock. It has been held by respectable authority that a contract to sell fish which might afterward be caught did not vest property in the fish when caught in the purchaser. If a vendor sells property not belonging to him, and subsequently acquires a title to it before the repudiation of the contract by the purchaser, the property in the thing sold vests immediately in the purchaser. Likewise in a contract of "sale or return," where the vendor had no title at the time of sale, but acquired one afterward, before the time limited for the return, the buyer who had allowed the time to elapse without returning the goods sold could not set up the failure of consideration in the original contract as a defense in an action for the price.

A definite description must be made of the subject-matter of the sale to render same valid. With the exceptions hereinafter mentioned, the subject-matter of a sale must be separated from the mass, so as to be capable of identification. An agreement to sell five hundred bushels of corn, to be measured out of a bulk, would not convey title until the required number of bushels had been measured out and separated from the mass.

Conditions and Warranties. Sales by Samples.

A statement or promise which forms the basis of a contract, and the untruth or non-performance of which discharges the same is termed a condition, and the fulfilment of the condition is a condition precedent to the attachment of any obligation on the party in whose favor it exists. A warranty, on the other hand, is an agreement with reference to the subject of the contract, but collateral to its main purpose. It is difficult to treat these subjects of representations, conditions and warranties separately, so closely are they associated together, but the distinction between them is of the most vital importance. If a representation is made when a contract of sale is entered into relative to the subject-matter thereof, and such statement is false, no valid contract was ever in existence. A party to a sale may make promises which may be either independent or conditional upon one another. If independent, failure by one of the parties to keep his promise does not discharge the contract. But when the promise of one party is conditional upon the promise of the other the law holds that the performance of the latter is either a condition precedent or concurrent to the obliga-

tion of the other party to perform his promise. A condition in a contract of sale is held to form the basis of the contract, the non-performance of which would discharge all obligations arising thereunder. A warranty differs from a condition in a contract of sale in that fulfilment is not a condition precedent and its breach does not discharge the contract. Upon the breach of a warranty the injured party has the right to recover damages which he has sustained as a result of the failure of the other party to perform his promise. If the parties regarded a particular statement as an essential term of the contract, such a statement is a condition, its performance is a condition precedent and its failure effects a breach. If the parties did not regard a certain statement as fundamental, it is a warranty, the breach of which entitles the injured party to damages only. The intention of the parties in this regard is arrived at by strictly interpreting the language of the contract and the circumstances under which it was made.

When goods are sold by description there is an implied condition that the goods shall correspond substantially with the description. Suppose a man should offer to purchase peas of another, but receives beans. This illustration is simple, but it illustrates a general principle to the effect that there was no warranty that the vendor should sell the vendee peas. The contract was to sell peas, and if any other commodity is sold there is a non-performance of the contract. In the sale of a described article, a tender of an article answering the description is a condition, which, if not performed, entitles the buyer to reject the article. The courts have held words of description to be more in the nature of warranties. For example, where the article sold was described in the bill of parcels as "blue paint," it was held that this amounted to a warranty that the article should be blue paint and not a different commodity.

Having pointed out the meaning of the term "warranty," one or two examples will furnish an illustration thereof as applied to a contract of sale. In a recent case, A wrote to B, "Our leather is now thoroughly tanned; will reship on Saturday, hoping the same will exist as before," and B replied: "If your leather is thoroughly tanned now, and all right in other respects, we will take it as before." The court held in a suit for the price of the leather that there was a warranty to furnish thoroughly tanned leather. Section 69 of the Uniform Sales Act defines the remedies available to a buyer upon a breach of warranty, and should be consulted before taking any action upon discovery of such breach of warranty. Where, however, the warranty was

fraudulent, the buyer may rescind and return within a reasonable time, and if he has paid the purchase money, he may recover it back, or if he has not, he may defend against an action for the same. Where the contract is executory, as where a particular article has been ordered without having been seen, and it is warranted to be of a given quality or description, the buyer is not bound to keep it or to pay for it on any terms. This is so, even though no fraud was intended by the vendor, but in such case the buyer must elect within a reasonable time whether to accept the article or not, and where the facts are disputed the question of reasonable time is one for a jury to decide. Inspection should be made immediately upon receipt of the shipment and a jury in determining a reasonable time within which to rescind, is guided by the nature of the sale, and circumstances incidental thereto.

In another well-known case a rivet-maker wrote to a dealer in iron: "We must have the very best quality for this purpose, and we should want it right along, all the time of the same quality, if we found it satisfactory," and the iron dealer replied: "As the best way of finding out whether the bar will answer your purpose is to try it, we suggest that you take a sample carload." It was held by the court that the statement was no warranty of the quality of the iron. But upon a sale of slate, to be "free from scabs and gray backs," if such slate were not furnished the purchaser would be entitled to a deduction for his damages for breach of warranty.

In a sale of machinery there is no warranty that a machine will perform certain functions. If a machine is constructed in accordance with the instructions given, it is no defense in a suit for its price that it would not perform the work for which it was designed. It has been held that where a known described and definite article is ordered and supplied, there is no warranty that it will answer the particular purpose intended by the buyer, and this would be the case, though such purpose be stated by the purchaser at the time of the sale. Sometimes a machine is warranted to give satisfaction, but where, for example, a warranty is made that a reaping machine will give satisfaction a retention of the reaper during the harvest, with no notice of defects, entitles the vendor to recover the purchase price. If machinery is sold with a warranty to give satisfaction, failure of notice to the seller to put the same in satisfactory condition is an election to retain, and the purchaser becomes liable for the contract price.

If a horse is warranted to be sound and kind, and is returned after one day's use by the purchaser upon the grounds that the horse is not kind, and it shortly afterward dies from founder,

if the purchaser used the horse properly he can recover for a breach of warranty.

When merchandise of any description is delivered to the buyer on trial or on approval, title to the property passes to the purchaser (1) when he signifies that same meets with his approval, or (2) on the expiration of the time limited for trial, or (3) if no time is limited, on the expiration of a reasonable time. However, if goods are delivered to the buyer with the understanding that the property is to pass to him immediately, but that he may thereafter return the same if he so desires, the property passes to the buyer, and in case of a return of the goods, revests in the seller.

Performance of Contract of Sale.

Certain rights and obligations are created by every contract of sale, the non-performance of which effects a breach and fastens liabilities on the guilty party. The vendor must, to discharge his obligations under a contract of sale, make delivery of the goods sold, the goods to comply with all warranties. It should be borne in mind that a warranty is a contract, and requires a valuable consideration to support it, and if the contract of warranty is made at the same time or at a reasonable time before the contract of sale is entered into, the consideration for the latter will always support the former. If, on the other hand, a warranty is made after the contract of sale is closed, a separate consideration is required to support such a warranty. In connection with warranties, mere expressions of opinion or general commendation of the goods do not constitute binding warranties. Some positive statements of facts must be made, and even if such a statement was made it would not cover patent or obvious defects. The law of sales is based upon the maxim *caveat emptor*, which, literally translated, means "let the buyer beware." When goods are sold by sample there is an implied warranty that the goods delivered will be of the same species and kind as the sample. There is, however, no implied warranty against latent defects in the goods which are present in both sample and bulk. In all cases where provisions are sold by retailers direct to consumers, or where they are sold by wholesalers to retailers, there is an implied warranty that the goods sold are fit for use as food.

Delivery.

Upon a cash sale the buyer is entitled to an immediate delivery of the goods upon payment or tender of cash. The buyer is also entitled to immediate delivery when the sale is on

credit and no definite time is fixed for delivery. It may be stated as a general proposition of law that the vendor is not obliged to deliver goods sold to the purchaser's residence or place of business. The vendor's contract is performed when he places the goods at the disposal of the buyer so that they may be removed by him. Special agreements as to delivery are usually made. Consequently when the contract provides for place of delivery, the transfer must occur at the place designated. In the absence of a designated place of delivery, the goods must be held ready for delivery at the place where they were at the time the sale took place. As we learned in our study of the subject of Common Carriers, delivery to a common carrier is delivery to the purchaser, but title to the goods shipped may be retained after delivery to the common carrier if a bill of lading is written in the name of the shipper providing that the goods are delivered subject to the order of the shipper. Before delivery of possession is effected the bill of lading must be indorsed and transferred by the shipper or the common carrier who is made the shipper's authorized agent.

In the performance of any contract of sale, delivery must be made within the time specified; if damages are occasioned by delay, the purchaser has a right to recover same. In the absence of any condition as to time of delivery the seller will be given reasonable time. It is further the duty of the vendor to deliver the exact quantity and a breach of contract occurs if either more or less are delivered than ordered. Many contracts of sale are entered into every day in a careless manner, and contain such general terms as to quantity as "about" and "more or less." In such case the vendor is not bound to deliver the exact number mentioned, but is deemed to have performed his contract upon delivery of approximately the number set forth in the contract. If it is agreed between the parties that the goods be delivered by instalments, and the contract is entire, failure to deliver one instalment or to accept same will give the injured party the right to rescind the contract and sue for damages.

Should the vendor retain possession of goods after a contract of sale is concluded, fraud would be presumed. Good faith in the transaction must be shown to overcome this presumption. In case goods are sold to two or more different persons by conveyances equally valid, the law will give the person lawful possession who obtains possession first.

Upon receiving goods, the buyer is given by law a reasonable time to examine the same to ascertain whether they are the same quantity and quality as he ordered. Oftentimes an accept-

ance is made conditionally, *i. e.*, acceptance may be conditional upon further performance of the contract by the vendor, as, for example, to remedy certain defects. The acceptance is made absolute when the defects are remedied by the seller.

When the buyer has accepted a delivery of goods, he thereupon becomes liable for the cost, and if no price was agreed upon he is liable for a fair or reasonable price, in law known as a *quantum meruit*. The seller of goods has the right to insist that the price be paid in money. It is altogether optional whether he accept a promissory note or check. Payment by note or check is conditional, and only becomes absolute when payment on the instrument has been made. If a man accepts a check and neglects to present the same to bank, and the bank should fail, the payment would be absolute and the loss would fall on the holder of the check (the vendor). The purchaser is liable for any loss occurring by transmitting the payment through the mails or other adopted agency.

Tender of Payment.

A technical tender of payment, such as will be recognized in law, is quite different from the common understanding of what constitutes a valid tender.

A tender is an offer to perform an obligation which a party is legally bound to perform and comprises six essential elements. A tender, in the first place, must be made in the currency which is legal tender for the payment of debts. The precise amount due must be tendered, and a tender of a greater or less sum will not be valid. Furthermore, the money must be produced and offered to the creditor and must be altogether unconditional. The tender must be continuous. The effect of making a legal tender of the price of goods to the vendor is to avoid the accumulation of interest and to protect the buyer from any costs in case suit is brought for the debt. When there has been a delivery of the goods by the seller and an acceptance thereof by the buyer, accompanied or followed by a payment or tender of payment of price, the contract of sale may be said to have been performed.

Fraud and Mistake.

It is unnecessary to analyze the elements of fraud and mistake which was covered under the head of "Reality of Consent" in our study of contracts. In connection with sales, it will suffice to say that the effect of mistake is to render the contract void. A person who has entered into a contract of sale, void on the ground of mistake, may, if it is still executory, repudiate it, and

successfully defend an action upon it. If he has paid money or delivered goods under the contract he may, upon returning what he has received under it, recover the money or the goods. Upon failure of the seller to perform his part of the contract, the buyer may put an end to it, and recover in an action for money had and received any part of the price which he may have advanced.

If a party to a contract of sale has been induced to enter into it by fraud of the other party, the contract is voidable at his option. Fraud in this connection is used in the sense of deceit and comprises three essentials. There must be a false representation or concealment of a material fact. There must be an intention to deceive or a negligent statement of a falsehood. The misrepresentation or concealment must have induced the deceived party to act. A man is not bound by a contract of sale to which his consent has been obtained by fraud, because, but for the fraud, he would not have given his consent. As ignorance of the law is never a defense, a misrepresentation of the law does not constitute fraud. There must be a misrepresentation of a material fact to render a contract fraudulent.

A fraudulent contract of sale is voidable, *i. e.*, the injured party may rescind it or he may affirm it. If he affirm the contract he may recover damages for the fraud in an action of deceit, or if sued for the price he may set up the fraud in reduction thereof. Such a contract must be affirmed or rescinded in whole and an election once made is final. If the party defrauded rescinds the contract, he may set up the rescission in defense of an action on the contract, or if such party be the buyer and has paid the price, he may maintain an action to recover the amount. If the injured party be the seller and has delivered the goods, he may maintain an action of replevin and recover the goods delivered.

A fraudulent contract being voidable and not void it follows that when innocent third persons have for value acquired rights under the sale, their rights cannot be interfered with. The rule is also stated to be an application of the principle of convenience that when one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud. For example, when a sale is procured by fraud, the property in the goods is transferred by the contract, subject to the seller's right of rescission, and one who purchases in good faith from the fraudulent buyer before the sale is rescinded acquires a good title. But where a person obtains goods by fraudulently impersonating a third person, or by pretending to be the agent for the third person to whom the

owner supposes he is selling the goods, the person so obtaining the goods acquires no title, nor would a *bona fide* purchaser from him.

A sale made with the intent on the part of the seller and buyer to delay or defraud creditors of the seller is fraudulent and such creditors may avoid the sale, which, although fraudulent as to the creditor, is valid between the contracting parties.

Sales in Bulk.

It frequently happens that a merchant desires to dispose of his entire stock and fixtures in bulk. Considerable injustice has been done creditors of such a merchant, because the purchaser, buying in good faith and ignorant of outstanding debts, would not be responsible for the liabilities of his predecessor. A remedy has been provided in recent years by the legislatures of most of the states in the enactment of what are popularly known as bulk sales laws. They provide, in substance, that the purchaser must obtain from the vendor, who must furnish, under oath, a full list of the names and addresses of all his creditors, with the amount owing to each of them. The purchaser must, a specified time before the completion of the sale, give personal notice to each of said creditors, of the time and terms of sale.

A sale consummated in violation of the requirements of the law is void, and the purchaser may be held liable to the creditors of said vendor for the fair value of the property so bought or sold by him. A creditor must, however, bring his action either at law or in equity within ninety days from the date of such sale.

A vendor who has made arrangement to pay his creditors must secure from them a written waiver of the requirements of this act, otherwise the sale is voidable, and the purchaser is rendered liable if action is taken within ninety days from the date of sale.

Sales by Agents.

An agent may enter into a valid contract of sale which shall be binding upon his principal if he acts within the scope of the express or implied powers with which he is clothed.

The text of this chapter embraces the essential principles of the law of sales, but as the Uniform Sales Act has been adopted in most of the states, it is quoted herein in full.

Uniform Sales Act.

SECTION 1.—Be it enacted, &c., That,—

First. A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

Second. A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

Third. A contract to sell or a sale may be absolute or conditional.

Fourth. There may be a contract to sell or a sale between one part owner and another.

SECTION 2. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor, or return the goods in substantially the same condition as when received, within reasonable time.

Necessaries in this section mean goods suitable to the condition in life of such infant or other person, and to his actual requirement at the time of delivery.

SECTION 3. Subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties.

SECTION 4. *First.* A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards, shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

Second. The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

Third. There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, or any part thereof, expresses by words or conduct his assent to becoming the owner of those specific goods.

SECTION 5. *First.* The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this act called "future goods."

Second. There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

Third. Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.

SECTION 6. *First.* There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares.

Second. In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight, or measure of the goods in the mass and though the number, weight, or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight, or measure bought bears to the number, weight, or measure of the mass. If the mass contains less than the number, weight, or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears.

SECTION 7. *First.* Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.

Second. Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed in character, the buyer may at his option treat the sale—

(*a*) As avoided, or

(*b*) As transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible, or to pay the agreed price for the goods in which the property passes if the sale was divisible.

SECTION 8. *First.* Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault on the part of the seller or the buyer the goods wholly perish, the contract is thereby avoided.

Second. Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer without any fault of the seller or the buyer, part of the goods perish or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract—

(*a*) As avoided, or

(*b*) As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible.

SECTION 9. *First.* The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.

Second. The price may be made payable in any personal property.

Third. Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, this act shall not apply.

Fourth. Where the price is not determined in accordance with the foregoing provisions, the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

SECTION 10. *First.* Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person without fault of the seller or the buyer cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

Second. Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by sections fifty-two to seventy of this act.

SECTION 11. *First.* Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first-mentioned party may also treat the non-performance of the condition as a breach of warranty.

Second. Where the property in the goods has not passed, the buyer may treat the fulfilment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods.

SECTION 12. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon no affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty.

SECTION 13. In a contract to sell or a sale, unless a contrary intention appears, there is—

First. An implied warranty on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of a contract to sell he will have a right to sell the goods at the time when the property is to pass.

Second. An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale.

Third. An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made.

Fourth. This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest.

SECTION 14. Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description, and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

SECTION 15. Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

First. Where a buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

Second. Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

Third. If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

Fourth. In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

Fifth. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

Sixth. An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith.

SECTION 16. In a case of a contract to sell or a sale by sample:

(*a*) There is an implied warranty that the bulk shall correspond with the sample in quality.

(*b*) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in section forty-seven, subsection third.

(*c*) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

SECTION 17. Where there is a contract to sell unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section six.

SECTION 18. *First.* Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

Second. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case.

SECTION 19. Unless a different intention appears, the following are the rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:—

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

Rule 3. *First.* When goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

Second. When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer—

(*a*) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction;

(*b*) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 4. *First.* Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

Second. Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section twenty. This presumption is applicable, although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery," or their equivalents.

Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

SECTION 20. *First.* Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.

Second. Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods so shipped and deliverable shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

Third. Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods as against the buyer.

Fourth. Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and a negotiable bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the person to whose order the bill of lading is drawn, one who purchases in good faith, for value, the bill of lading or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful; but delivery to the endorsee of the bill of lading shall discharge the carrier from all responsibility for the goods.

SECTION 21. In the case of a sale by auction—

First. Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale.

Second. A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw goods from sale unless the auction has been announced to be without reserve.

Third. A right to bid may be reserved expressly by or on behalf of the seller.

Fourth. Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself, or to employ or induce any person to bid at such sale on his behalf; or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller, or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer.

SECTION 22. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that—

(*a*) Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract, and the property in the goods has been retained by the seller merely to secure the performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery.

(*b*) Where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

SECTION 23. *First.* Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

Second. Nothing in this act, however, shall affect—

(*a*) The provisions of any factor's acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;

(*b*) The validity of any contract to sell or sale under any special common law or statutory power of sale, or under the order of a court of competent jurisdiction.

SECTION 24. Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.

SECTION 25. Where a person having sold goods continues in possession of the goods, or of negotiable documents of title of the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

SECTION 26. Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.

SECTION 27. A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document, is a negotiable document of title.

SECTION 28. A negotiable document of title may be negotiated by delivery—

(*a*) Where, by the terms of the document, the carrier, warehouseman, or other bailee issuing the same, undertakes to deliver the goods to the bearer; or

(*b*) Where, by the terms of the document, the carrier, warehouseman, or other bailee issuing the same, undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the document has indorsed it in blank or to bearer.

Where, by the terms of a negotiable document of title, the goods are deliverable to bearer, or where a negotiable document of title has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the document shall thereafter be negotiated only by the indorsement of such indorsee.

SECTION 29. A negotiable document of title may be negotiated by the indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, to bearer, or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer, or to another specified person. Subsequent negotiation may be made in like manner.

SECTION 30. If a document of title, which contains an undertaking by a carrier, warehouseman, or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of a specified person, or which contains words of like import, has placed upon it the words "not negotiable," "non-negotiable," or the like, such a document may nevertheless be negotiated by the holder and is a negotiable document of title within the meaning of this act. But nothing in this act contained shall be construed as limiting or defining the effect upon the rights and obligations of the carrier, warehouseman, or other bailee issuing a document of title or placing thereon the words "not negotiable," "non-negotiable" or the like.

SECTION 31. (*a*) A document of title which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A non-negotiable document cannot be negotiated, and the indorsement of such a document gives the transferee no additional right.

(*b*) Nothing in this section, nor in any other provision of this act, shall be construed to impose upon any common carrier any obligation to require the surrender of the bill of lading or shipping receipt before making delivery of the goods, where, by the terms of said bill of lading or shipping receipt, the goods are deliverable to the consignee without surrender of such bill of lading or shipping receipt.

SECTION 32. A negotiable document of title may be negotiated—

(*a*) By the owner thereof; or

(*b*) By any person to whom the possession or custody of the document has been entrusted by the owner, if, by the terms of the document, the bailee issuing the document undertakes to deliver the goods to the order of the person to whom the possession or custody of the document has been entrusted, or if at the time of such entrusting the document is in such form that it may be negotiated by delivery.

SECTION 33. A person to whom a negotiable document of title has been duly negotiated acquires thereby—

(*a*) Such title to the goods as the person negotiating the document to him had, or had ability to convey to a purchaser in good faith, for value; and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had, or had ability to convey to a purchaser in good faith, for value; and

(*b*) The direct obligation of the bailee issuing the document to hold possession of the goods for him, according to the terms of the document, as fully as if such bailee had contracted directly with him.

SECTION 34. A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If the document is non-negotiable, such person also acquires the right to notify the bailee who issued the document of the transfer thereof, and thereby to acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document.

Prior to the notification of such bailee by the transferor or transferee of a non-negotiable document of title, the title of the transferee to the goods, and the right to acquire the obligation of such bailee, may be defeated by the levy of the attachment or execution upon the goods by a creditor of the transferor, or by a notification to such bailee by the transferor, or a subsequent purchaser from the transferor, of a subsequent sale of the goods by the transferor.

SECTION 35. Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

SECTION 36. A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title, unless a contrary intention appears, warrants:

(*a*) That the document is genuine;

(*b*) That he has a legal right to negotiate or transfer it;

(*c*) That he has knowledge of no fact which would impair the validity or worth of the document; and

(*d*) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby.

SECTION 37. The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfil their respective obligations.

SECTION 38. The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was induced by fraud, mistake, or duress to entrust the possession or custody thereof to such person, if the person to whom the document was negotiated, or person to whom the document was subsequently negotiated, paid value therefor, without notice of the breach of duty, or fraud, mistake, or duress.

SECTION 39. If goods are delivered to a bailee by the owner, or by a person whose act in conveying the title to them to a purchaser in good faith, for value, would bind the owner, and a negotiable document of title is issued for them, they cannot thereafter, while in the possession of such bailee, be attached by garnishment or otherwise, or be levied upon under an execution, unless the document be first surrendered to the bailee or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court.

SECTION 40. A creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such document or in satisfying the claim by means thereof, as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

SECTION 41. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale.

SECTION 42. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

SECTION 43. *First.* Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer, is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business, if he have one, and, if not, his residence; but, in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery.

Second. Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

Third. Where the goods at the time of the sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but, as against all others than the seller, the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document or of title to goods.

Fourth. Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

Fifth. Unless otherwise agreed, the expenses of, and incidental to, putting the goods into a deliverable state, must be borne by the seller.

SECTION 44. *First.* Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

Second. Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods, so delivered, he must pay for them at the contract rate.

Third. Where the seller delivers to the buyer the goods he contracted to sell, mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

Fourth. The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

SECTION 45. *First.* Unless otherwise agreed, or it is to be implied from the nature of the contract, the buyer of goods is not bound to accept delivery thereof by instalments.

Second. Where there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it depends in each case on the terms of the contract, and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken.

SECTION 46. *First.* Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is deemed to be a delivery of the goods to the buyer, except in the case provided for in section nineteen, rule five, or unless a contrary intent appears.

Second. Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

Third. Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows, or ought to know, that it is usual to insure, the seller must give notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit.

SECTION 47. *First.* Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

Second. Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

Third. Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words "collect on delivery," or otherwise, the buyer is not entitled to examine the goods before payment of the price, in the absence of agreement and proper written authority to the carrier permitting such examination.

SECTION 48. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

SECTION 49. In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise

or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty, within a reasonable time after the buyer knows or ought to know of such breach, the seller shall not be liable therefor.

SECTION 50. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them.

SECTION 51. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default.

SECTION 52. *First.* The seller of goods is deemed to be an unpaid seller within the meaning of this act—

(*a*) When the whole of the price has not been paid or tendered;

(*b*) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise.

Second. In sections fifty-two to sixty-two of this act the term "seller" includes an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller.

SECTION 53. *First.* Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has—

(*a*) A lien on the goods or right to retain them for the price while he is in possession of them;

(*b*) In case of the insolvency of the buyer, a right of stopping the goods in transitu, after he has parted with the possession of them;

(*c*) A right of resale as limited by this act;

(*d*) A right to rescind the sale as limited by this act.

Second. Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

SECTION 54. *First.* Subject to the provisions of this act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

(*a*) Where the goods have been sold without any stipulation as to credit;

(*b*) Where the goods have been sold on credit, but the term of credit has expired;

(*c*) Where the buyer becomes insolvent.

Second. The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

SECTION 55. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention.

SECTION 56. *First.* The unpaid seller of goods loses his lien thereon—

(*a*) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer, without reserving the property in the goods or the right to the possession thereof;

(*b*) When the buyer or his agent lawfully obtains possession of the goods;

(*c*) By waiver thereof.

Second. The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods.

SECTION 57. Subject to the provisions of this act, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit; that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession.

SECTION 58. *First.* Goods are in transit, within the meaning of section fifty-seven—

(*a*) From the time when they are delivered to a carrier by land or water, or other bailee, for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee.

(*b*) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back.

Second. Goods are no longer in transit, within the meaning of section fifty-seven,—

(*a*) If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination;

(*b*) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf, and continues in possession of them as bailee for the buyer or his agent; and it is immaterial that further destination for the goods may have been indicated by the buyer;

(*c*) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf.

Third. If the goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case whether they are in the possession of the master as a carrier or as agent of the buyer.

Fourth. If part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods.

SECTION 59. *First.* The unpaid seller may exercise his right of stoppage in transitu either by obtaining actual possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice must state that the buyer is insolvent and has not paid the seller of the goods, and may be given by either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer.

Second. When notice of stoppage in transitu is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such redelivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver, or justified in delivering, the goods to the seller, unless such document is first surrendered for cancelation.

SECTION 60. *First.* Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien, or having stopped the goods in transitu, may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or the sale, or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

Second. Where a resale is made, as authorized in this section, the buyer acquires a good title as against the original buyer.

Third. It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods, or upon an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer has been in default an unreasonable time before the resale was made.

Fourth. It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer.

Fifth. The seller is bound to exercise reasonable care and judgment in making a resale, and, subject to this requirement, may make a resale either by public or private sale.

SECTION 61. *First.* An unpaid seller having a right of lien, or having stopped the goods in transitu, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

Second. The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer, or by some other overt act, an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of rescission was asserted.

SECTION 62. Subject to the provisions of this act, the unpaid seller's right of lien or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the right of any purchaser, for value, in good faith, to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier, or other bailee who issued such document, of the seller's claim to a lien or right of stoppage in transitu.

SECTION 63. *First.* Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

Second. Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller, at any time before judgment in such action, has become unable to perform the contract or the sale on his part, or has manifested an intention not to perform it.

Third. Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section sixty-four (four) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's, and may maintain an action for the price.

SECTION 64. *First.* Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

Second. The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

Third. Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

Fourth. If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfil his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be allowed for in estimating such damages.

SECTION 65. Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer.

SECTION 66. Where the property in the goods has passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.

SECTION 67. *First.* Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery.

Second. The measure of damages is the loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

Third. Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

SECTION 68. Where the seller has broken a contract to deliver specific or ascertained goods a court having the powers of a court of equity may, if the remedy at law be inadequate, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just.

SECTION 69. *First.* Where there is a breach of warranty by the seller, the buyer may, at his election,—

(*a*) Accept or keep the goods, and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price;

(*b*) Accept or keep the goods, and maintain an action against the seller for damages for breach of warranty;

(*c*) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for breach of warranty;

(*d*) Rescind the contract to sell or the sale and refuse to receive the goods, or, if the goods have already been received, return them or offer to

return them to the seller, and recover the price or any part thereof which has been paid.

Second. When the buyer has claimed and been granted a remedy in any one of those ways, no other remedy can thereafter be granted.

Third. Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if the deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

Fourth. Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

Fifth. Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuse to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section fifty-three.

Sixth. The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

Seventh. In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

SECTION 70. Nothing in this act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

SECTION 71. Where any right, duty, or liability would arise under a contract to sell or a sale, by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale. All implications from surrounding circumstances, or from the nature of a contract or agreement, shall be regarded as forming part of the contract or agreement.

SECTION 72. Where any right, duty, or liability is declared by this act, it may, unless otherwise by this act provided, be enforced by action.

SECTION 73. In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods.

SECTION 74. This act shall be so interpreted and construed, if possible, as to effectuate its general purpose to make uniform the law of those states which enact it.

SECTION 75. The provisions of this act relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgage, pledge, charge, or other security.

SECTION 76. *First.* In this act, unless the context or subject-matter otherwise requires—

"Action" includes counterclaim, set-off and suit in equity.

"Buyer" means a person who buys or agrees to buy goods, or any legal successor in interest of such person.

"Defendant" includes a plaintiff against whom a right of set-off or counterclaim is asserted.

"Delivery" means voluntary transfer of possession from one person to another.

"Divisible contract to sell or sale" means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation.

"Document of title to goods" includes any bill of lading, dock warrant, warehouse receipt, or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods, or authorizing or purporting to authorize the possessor of the document to transfer or receive, either by indorsement or by delivery, goods represented by such document.

"Fault" means wrongful act or default.

"Fungible goods" means goods of which any unit is, from its nature or by mercantile usage, treated as the equivalent of any other unit.

"Future goods" means goods to be manufactured or acquired by the seller after the making of the contract of sale.

"Goods" include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

"Order" in sections of this act relating to documents of title, means an order by indorsement on the document.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

"Plaintiff" includes defendant asserting a right of set-off or counterclaim.

"Property" means the general property in goods, and not merely a special property.

"Purchaser" includes mortgagee and pledgee.

"Purchases" includes taking as a mortgagee or as a pledgee.

"Quality of goods" includes their state or condition.

"Sale" includes a bargain and sale, as well as a sale and delivery.

"Seller" means a person who sells or agrees to sell goods, or any legal successor in interest of such person.

"Specific goods" means goods identified and agreed upon at the time a contract to sell or a sale is made.

Goods which are not specific are unascertained, within the meaning of this act.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of title are taken either in satisfaction thereof or as security therefor.

Second. A thing is done "in good faith" within the meaning of this act when it is in fact done honestly, whether it be done negligently or not.

Third. A person is insolvent within the meaning of this act who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not.

But the failure to pay particular debts shall not of itself constitute insolvency, nor is any one insolvent who is able to pay his debts, as they mature, in current bankable funds, though such medium of payment is not a legal tender for the payment of debts.

Fourth. Goods are in a "deliverable state" within the meaning of this act when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.

SECTION 77. This act may be cited as The Sales Act.

Up to April, 1931, the Uniform Sales Act has been adopted in Alaska, Arizona, Connecticut, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin, Wyoming.

BUSINESS CRIMES

Definition — Conspiracy — Embezzlement — Forgery — Larceny — Libel—Trespass—Nuisances—Malicious Prosecution.

IN view of the numerous criminal prosecutions which have in the recent past been instituted against large financial interests, and the general crusade that is being waged to protect the public against dishonest business methods it seems timely to consider what may be termed "Crimes in Business."

Public policy or the public good is the ground upon which certain acts are declared crimes and punished, while others which may seem to some equally wrong are not. Although no injury can be done any member of the community without injury to the community itself, wrongs which operate as a serious injury to an individual are unnoticed unless they perceptibly injure or endanger the other members of the community. For instance, in a certain case a man was charged with having falsely and deceitfully sold to another sixteen gallons of malted liquor for, and as, eighteen gallons. It was held that such an act was not an indictable offense, because it was merely an injury to a private person. If, however, a man uses false weights and measures and sells by them to all or to many of his customers, or uses them in the general course of his business, it would be such an offense as affects the general public, and hence punishable as a crime. Likewise any deceptions practiced in business which common care and prudence are insufficient to guard against are crimes.

Such wrongful acts as affect only an individual are classified as private wrongs or torts, such as affect the public as crimes or misdemeanors. When an act is both a tort and a crime the wrongdoer is liable both to a civil action by the person he has particularly injured and to a criminal proceeding by the state. The object of these two proceedings are quite distinct; the civil action is for the purpose of obtaining redress for a private injury, the object of the criminal proceeding is to punish the wrongdoer as an example. Another important distinction which should be carefully observed is that in cases of torts the injured person may settle with the wrongdoer, or may refrain from bringing any action against him, whereas, in cases of crimes, as soon as a crime is committed, the injury is done and the state's right and duty to punish accrues. The person particularly injured has no control over the criminal proceedings and no settlement between him and the wrongdoer

can make the act any the less a crime or take away the state's right to punish it. As a matter of fact, if a person attempts to settle with the offender, or agrees not to inform on him, he is himself guilty of a crime. To attempt to settle any of the higher grades of crimes for a cash consideration is blackmail. Statutes in most of the states have made it permissible to settle minor crimes or misdemeanors.

A person may commit a crime simply by remaining passive when the law requires him to act. To illustrate: A father is guilty of a crime who fails, when able, to furnish food to a child who is dependent on him and who dies from the neglect.

No better definition of a crime can be given than that contained in Blackstone: "A crime, or misdemeanor, is an act committed or omitted in violation of a public law either forbidding or commanding it." Crimes have been divided according to their nature into crimes *mala in se* and crimes *mala prohibita.* The former class comprises those acts which are immoral or wrong in themselves, such as murder, arson, larceny, etc., while the latter class comprises those acts to which, in the absence of statute, no moral turpitude attaches, and which are crimes only because they have been prohibited by statute.

A crime must be an act either prohibited by the common law or by statute. There are acts which may never before have been committed, but which, when they are committed, may be punished. The fact that a man does not know what the general sanctions of the common law prohibit is immaterial, for he is presumed to know the law, and ignorance is no excuse. Morality and the teachings of Christianity have exercised a potent influence in the formation of the common law. Such acts as the heart and conscience of every mentally-responsible human being declare to be wrong are punishable by the common law. Such acts as in themselves are not wrong may be constituted crimes by the legislature on grounds of public policy.

Of course, no one can be held responsible for a crime, or even be guilty of a crime, unless he has sufficient capacity mentally and otherwise to commit it. The test of responsibility is the power of the offender to differentiate between what is right and what is wrong. Consequently insanity and extreme infancy are complete defenses against charges of crime.

Voluntary drunkenness at the time a crime is committed affords no defense, nor is emotional insanity available to avoid the punishment for criminal acts. It has been held that a corporation may be criminally liable for omission to perform a duty imposed upon it by law.

It is not necessary that one actually commits a criminal act to be guilty thereof. One may employ an innocent person to perform an act, such as the delivering of poison to another, but is nevertheless liable as a principal for the crime committed. Anyone who aids or abets the commission of a crime is guilty as an accessory thereto. Furthermore, a mere attempt to commit a crime is itself punishable as such, whether or not any overt act was ever done in carrying out such unlawful purpose.

An offense committed by a wife in the immediate presence of her husband is presumed to be done by his coercion and in such event the wife is not liable for her act. Coverture is no protection against the consequence of a criminal act, when the part taken by the wife is shown to have been active and willing. Where a wife procured a check and suggested to her husband the idea of raising it, and he in her presence erased the payee's name and the amount, and when she was not present filled the space with a larger amount, she receiving nearly one-half the proceeds of the crime, it was held that she was not properly convicted as a principal. A wife cannot commit larceny by stealing her husband's goods, neither can she embezzle them. Neither can a wife be convicted of receiving stolen goods from her husband, where they were stolen by him and delivered to her.

No person can be held liable criminally for an act which it is not in his power to prevent. In cases of extreme peril from shipwreck where there is a necessity that a part should be sacrificed to save the remainder, a decision by lot is ordinarily resorted to unless the peril is so sudden and overwhelming as to leave no choice of means and no moment for deliberation. Actual force upon the person or personal restraint, or fear of personal injury or imprisonment, excuses acts committed during the continuance of such force or duress.

Having in a general way analyzed the elements which constitute a crime, we are in a better position, it is hoped, to consider those particular crimes which affect a man in his business relations.

Criminal Conspiracy.

One of the most serious in the calendar of crime is that of conspiracy. Any agreement to do an act which amounts to a civil wrong is a criminal conspiracy. As soon as the unlawful combination or agreement is entered into the crime of conspiracy is complete, and it is not necessary that there should be any act done or attempt made to carry out the agreement. A combination of persons to commit a wrong is so much more dangerous, because

of the increased power to do the wrong, that the law regards it as criminal, whereas if the wrong were attempted by a single individual the act would not be punishable as a crime.

It has been held criminal to conspire to do acts which will prejudice the public generally, as, for instance, to manufacture a spurious article to sell as genuine; to obtain a monopoly, and raise the price of a commodity, so as to compel consumers to purchase at an exorbitant price. A combination entered into by dealers to prevent competition in the sale of coal has been held to constitute a criminal conspiracy, without regard to what was done, and, though the object was protection from ruinous rivalry, and no attempt was made to charge excessive prices. The gist of the offense of conspiracy is the unlawful confederacy to do an unlawful act or to do a lawful act by unlawful means.

One of the most common forms of conspiracy in business is to cheat and defraud, and a division of the profits of a fraudulent transaction is sufficient evidence of a combination or conspiracy to defraud. An agreement to defraud any person, class, company or corporation constitutes a conspiracy. Any understanding by two or more persons to dispose of goods in contemplation of bankruptcy is punishable as a conspiracy.

Any agreement to depress the value of the capital stock of a corporation dealt in on the Stock Exchange is a crime. The law punishes any joint effort to purchase goods upon misrepresentation of solvency or with no expectation of paying for same, as a conspiracy.

No one is authorized to destroy or hinder unlawfully the lawful business of another for the purpose of helping himself. Any conspiracy to injure a man in his trade or profession is indictable as a crime. A combination between one member of a partnership and a third person to issue and circulate the notes of the firm drawn by such parties for the purpose of paying his individual debts is criminal. A conspiracy is indictable where the object is to cheat by fraudulently overvaluing a commodity.

The labor and skill of the workmen, the plant of the manufacturer and the equipment of the farmer are in an equal sense property. Every man has the right to employ his talents, industry and capital as he pleases, free from the dictation of others; and, if two or more persons combine to coerce his choice in this behalf it is a criminal conspiracy, whether the means employed are actual violence, or a species of intimidation that works upon the mind.

Conspiracy to compel an employer to discharge certain workmen and threatening to quit the employment if he does not, has been held to be an indictable conspiracy, although many states

have passed special statutes with reference to trade unions. The courts have held that associations of men may endeavor peaceably and in a reasonable manner, to persuade others to cease or abstain from work; but if by force or intimidation they endeavor to control the free agency, or overcome the free will of their fellow-workmen they become guilty of a penal offense. The exposure of a legitimate business to the control of an association that can order away its employees and frighten away others that it may seek to employ, and thus be compelled to cease the further prosecution of its work, is a condition of things utterly at war with every principle of justice and with every safeguard of protection that a citizen under our system of government is entitled to enjoy.

The law likewise makes it criminal for employers to combine for the purpose of depressing the wages of labor which is prejudicial to the public and oppressive to the individual. The "boycott" is not the remedy to adjust the difference between capital and labor.

It is unlawful for employers wrongfully to coerce, intimidate or hinder the free choice of workmen in the disposal of their time and talents. It is commendable for any body of men to associate themselves together for the purpose of bettering their financial and social condition, and the very genius of free institutions invites them to higher levels and better fortunes. There is nothing unlawful in a strike to compel an employer to comply with certain regulations and when on said strike in "picketing" the employer's premises.

By "picketing" we mean watching and speaking to the workmen as they go to or return from their employment, to induce them to leave the service, so long as they abstain from actual violence. Men may lawfully combine together to dictate their own wages, fraternize with their own associates, choose their own employers, and serve man and mammon according to the dictates of their own conscience.

In all conspiracies it should be remembered that the act of each conspirator is the act of the other if done in the prosecution of the common design. Any participation in a concerted plan to injure another by fraud or otherwise renders a party liable as principal. If an act in its natural characteristics and quality is unlawful, knowledge of its wrongful character is presumed.

Embezzlement.

Embezzlement is a fraudulent appropriation of another's property by a person to whom it has been entrusted or into whose hands it has lawfully come. It differs from larceny in that the original taking of the property was lawful or with the consent of

the owner, while in larceny the felonious intent must have existed at the time of the taking. This crime is a statutory offense and involves two general elements—(1) a breach of duty or trust in respect of money, property or effects, in the party's possession belonging to another; (2) the wrongful or fraudulent appropriation thereof.

Where a person drawing his deposit from a bank is by mistake paid more than is due him he is not guilty of embezzlement, but may be sued for the difference in a civil action. There must be a relation of confidence and trust between the person appropriating property and the owner to constitute embezzlement, and the appropriation must be with a fraudulent intent. Mere breach of contract, as, for instance, a failure to pay back borrowed money, or a mere neglect to pay over funds, is not sufficient. If a servant, clerk or agent has merely the custody of the money or goods which he feloniously appropriates the offense is larceny; if he has the possession it is embezzlement. Custody as distinguished from possession in the connection here used means a charge to keep and care for the owner, subject to his order and direction, without any interest or right therein adverse to him, which every servant possesses with regard to the goods of his master confided to his care, which custody may be terminated or prolonged according to the will and pleasure of the master. Where, however, the owner of personal property delivers it to another for any purpose, intending not only to part with the custody, but with the absolute right and control of the property for any length of time, he parts not only with such custody, but the legal possession as well. A trust relationship must exist at the time of the reception of the money by the agent or employee or the money must be under the care of the agent by virtue of his agency or employment, in order to constitute the crime of embezzlement.

Forgery.

In connection with the crime of forgery it has been held that where a person procures the signature of another upon a blank paper, and without authority from the latter, writes a promissory note or other apparently valid instrument above it, he is guilty of forgery. This rule of law applies to cases where an agent, having the genuine signature of his principal with instructions to write an instrument disobeys his instructions.

The fraudulent alteration of an instrument, with intention to defraud or prejudice another, is such a false making as to constitute forgery. The signing of a fictitious name is not forgery when the offense is not the assumption of the name of a supposed

third person, but is merely the adoption of an alternative name of the party charged. Likewise where one subscribes a fictitious name to a check, and passes it as his own, it will not be forgery if credit is given to the person rather than the name.

The intent to defraud is not limited to obtaining money or property; it is sufficient if the forged instrument is to the prejudice of the rights of some person. The intent to defraud cannot be overcome by the fact that the forgery was not successful and that no one has been prejudiced. While it is true, as a general proposition, that a person cannot be punished for forgery for making false entries in his own books, yet it has been held that it is forgery to make false entries in pass books, to make false entries in books of original entry, to make false entries in book settlements, and for a clerk to make false entries in books he is employed to keep.

An instrument to be the subject of forgery must possess some legal effect. Consequently an instrument void on its face cannot be made the subject of forgery. Instruments showing a legal liability on the part of a party whose name is purported to be signed thereto to pay a sum of money are subjects of forgery; but it is otherwise as to an instrument not payable in money nor to the bearer, and which the maker only promised to take in payment. Where a promissory note is, after being endorsed by the payee, altered by the maker and discounted by him, it is a forgery of the note and not of the endorsement. Checks are subject to forgery even though post-dated.

Uttering Forged Instruments.

While the making of a forged instrument and the uttering of it by the same person as one transaction constitute but one offense, one may be guilty of uttering an instrument forged by another, but to constitute the latter offense it is necessary that the person who utters (passes) the forged instrument should have actual knowledge of its falsity. It will be noticed that the uttering of an instrument which is not a forgery does not come within the definition; nevertheless the uttering of a false instrument, with intent to defraud, is an offense, although there was lack of evil intent in the person who fabricated the instrument.

Uttering and publishing of a forged instrument consists in the delivery of such instrument to another for value, with an intention that the same shall be put in circulation, and an intention thereby to defraud by using it in some way so as to get money or credit thereon or by means thereof. The following

case will illustrate what constitutes an uttering of a forged paper: A, a stranger in Omaha, met B who professed to have a large farm near St. Louis, and desired to employ A to superintend it. While they were conversing a pretended freight agent appeared who was introduced by B to A as such, and who demanded of B the payment of a pretended freight bill of $65. B pretended he had not sufficient change to pay the bill, presented to A a forged check on an Omaha bank for $250, saying he could get the money on presentation, and asked him to cash it. The court held that this transaction constituted an uttering of the check, although it was not actually transferred.

Presentation of a draft or order for money to the person to whom it purports to be directed, for payment thereof, by one knowing it to be forged, although payment is refused and the draft is returned to the presenter, is an uttering and publishing within the meaning of the law. Depositing with a bank for collection notes containing forged endorsements, with intent to defraud, in a case where both the holder and the maker know of the existence and character of the forged endorsement is a criminal act. Collecting money on a forged endorsement is an uttering whether or not it is produced at the time payments are received.

In concluding our discussion of the crime of forgery we may summarize as follows: To render one liable for forgery it is not essential that the instrument on which the prosecution is based should have been made or altered by defendant himself. He will be guilty of the offense if with fraudulent intent he procures this to be done by another, or, after procuring it to be done, utters or publishes it; and it is immaterial that the person making or altering the instrument is innocent of any fraudulent intent. One who procures another to utter a forged instrument is as culpable as if he had perpetrated the act himself. One is also guilty of forgery where he procures another to sign the latter's own name, which the former thereafter represents to be that of a third person. It is an elementary proposition of law that all who act together with a common design are principals. The degree of aid or assistance given in the forgery of papers with the intent to defraud has been held to be unimportant. Where an insurance agent forged an application for insurance and notes for the premium, and sent them to his company for the purpose of fraudulently securing his commission, it was held that he could not escape conviction on the ground that the forgery was discovered and no policy issued, and the notes never became valid obligations for the payment of money.

Larceny.

The crime of larceny is frequently committed in business circles, and we will, therefore, confine our attention briefly to a consideration of the elements which comprise this offense.

Larceny has been defined as the wrongful and fraudulent taking and carrying away by any person of the mere personal goods of another, from any place with a felonious intent to convert them to the taker's use, and make them his property without the consent of the owner. The taking is an essential part of the crime of larceny, but the stolen property need not pass into the actual manual possession of the thief. It is not necessary that the taking of another's property be done with felonious intent, if there be a subsequent wrongful appropriation thereof. To illustrate: A drove away a flock of lambs from a field, and in so doing inadvertently drove away with them a lamb, the property of another person, and as soon as he discovered that he had done so, sold the lamb for his own use, and then denied all knowledge of it. This was held to be larceny. The distinction between larceny and robbery is that the former is done without violence or circumstances of terror resorted to for the purpose of inducing the owner to part with his property, whereas the latter is the taking of another's property by force. At common law the only subjects of larceny were tangible movable chattels, something which could be taken in possession and carried away, and which had intrinsic value. Statutes have been enacted making it larceny to misappropriate stock certificates, promissory notes, bills of exchange, checks, receipts, account books, letters patent and other commercial specialties which, at common law, could not be made the subjects of larceny.

In business transactions this crime most frequently occurs when one seeks to obtain property in the possession of another upon the erroneous impression that it belongs to the taker, without legal process of course. In order to constitute larceny, it is essential that possession of another's property be obtained unlawfully; that is, against the will or without the consent of the owner. It is larceny for one to insert a metal disk in an automatic slot machine for the purpose of obtaining something of value, which the owner intended to part with only to one who placed a coin in the slot. It may seem paradoxical, but it is nevertheless the case that a man may steal his own property if by taking it his intent is to charge with its value one to whom he had bailed it.

A part owner of property cannot be convicted of stealing it unless the person from whom it was taken was entitled to its

exclusive possession. The mere delivery of property to another for a special purpose vests in the person receiving it only the temporary charge or custody; the possession of the property remains in the owner and a conversion of it is larceny, as in the case of the delivery of money by the owner to another for the purpose of having it changed into other money of a different denomination. The same rule applies to the receipt and appropriation of money by one not entitled thereto, paid him by mistake. A delivery of property on condition of immediate payment does not transfer the right of possession to such property until the performance of the condition, and if the receiver of the property retains its possession without making payment he may be charged with larceny.

Where one dealer sends an order to another for a number of articles with the understanding that they were to be exhibited to a customer and those not sold returned, such dealer is guilty of larceny if he refuses to return the goods upon demand or account for their sale. Where goods were bought to be delivered C. O. D. and when so sent the buyer pays with a check which is subsequently returned with "not sufficient funds" marked thereon, and thereafter refuses to pay for the same and retains possession of the goods, he is guilty of larceny.

The felonious intention which is essential to the crime of larceny must, as a general rule, exist at the very time of the taking; no subsequent intent will render the previous taking felonious. This rule does not, however, apply to a bailee or to a person to whom property is delivered for some specific purpose.

Lost Property.

Lost property may be the subject of larceny and should receive the same protection from the law as goods in any other situation. To constitute theft of lost property the fraudulent intent which is the gist of the offense must exist in the mind of the taker at the time of the taking. The existence of such intent is properly inferred where the finder knows the owner of the property at the time of the finding, or had reasonable grounds of knowing who he is, and the same rule applies to the finding and appropriation of marked property, or any property where the finder has at the time of the finding any means of inquiry such as to give him reason to believe that with reasonable effort the owner will be found. To avoid a charge of larceny the finder of lost property should adopt all reasonable means of ascertaining the owner.

Where goods of a master are in a servant's custody, any act

of the servant which is inconsistent with the master's retaining the possession of them is sufficient to constitute a taking of possession by the servant. If the owner of property places the same in the possession of another, such as a tailor or cobbler, who thereby acquires an interest in the goods for services rendered thereon, the owner will be guilty of larceny if he takes his own property from such bailee without his consent and without paying for his services.

If a chattel has been delivered and received under a mutual mistake as to its character, a subsequent misappropriation by the recipient will not constitute larceny. There are oftentimes cases where one takes another's property without his consent that do not amount to larceny. Thus, where a bartender refused to get up and serve some late customers and they helped themselves, offering to pay for their refreshment the next day, which they did, the court held no larceny was committed. Where one takes another's saddle but leaves more than sufficient property to pay for it with a letter directing the owner to pay himself out of such property the taker is not guilty of larceny. Some authorities are, however, to the contrary. It is an element of the offense that the taking must be felonious and for the purpose of gain.

Larceny by Bailee.

It has been made a crime by statute for any person who is a bailee of property to fraudulently take and convert the same to his own use, or to that of any other person except the owner thereof. Anyone who hires property from another and refuses to return same is guilty of larceny by bailee. One leasing jewelry or other personal property upon the instalment plan with an option to purchase same upon the payment of a certain number of instalments is guilty of larceny by bailee if he default in the payment of instalments and refuse to deliver the leased property upon demand being made thereafter.

Libel and Slander.

No more grievous wrongs can be committed in society than those which deleteriously affect a man's character and reputation. The faculty of speech, which is one of the first and noblest gifts of the Creator, has been abused for the purposes of blasphemy, fraud and malice, as has likewise the freedom of the press, which is one of the most potent safeguards of liberty. To place a bridle on men's tongues so that they may be restrained from calumny and to curb the licentiousness of the public press and other means of communication has been a problem which has engaged the atten-

tion of jurists from time immemorial. In view of their importance, we will endeavor to distinguish between these correlated offenses, and point out the limitations which have been imposed by law upon the written and spoken communications of men.

A libel as been judicially defined as a malicious defamation, expressed in print or writing, or by signs and pictures tending to blacken the memory of the dead, with an intent to provoke the living, or to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt and ridicule. It may be said generally that language in writing is libelous which denies to a man the possession of some such worthy quality as every man is presumed to possess, or which tends to bring a party into public hatred or disgrace, or to degrade him in society.

False defamatory words, if written and published, constitute a libel; if spoken, a slander. Libel has always been regarded as a more serious offense than slander, because anything that is written and published evinces a more deliberate intention to injure another and is calculated to circulate more extensively than mere oral words which, when spoken, are frequently soon forgotten or misunderstood. Many words if spoken of another give no right of action to the party to whom they refer, which, however, if written would be actionable. Words spoken must impute some crime so as to endanger the person to whom they relate, or they must impute to him something which would tend to exclude him from society and lead one to avoid him. But a publication which renders the person ridiculous merely, and exposes him to contempt, which tends to render his situation in society uncomfortable and irksome, which reflects a moral turpitude on the party and holds him up as a dishonest and mischievous member of society, and describes him in a scurrilous and ignominious point of view, is considered as a libel.

A man has the same constitutional right to the protection of his character and reputation as he has to his liberty and property. The foundation of a man's redress for defamation, whether by libel or slander, is the injury done to his reputation. A mere injury to a man's feelings is not sufficient to enable him to sue for damages. The law recognizes certain inferences from the use of certain words, and if spoken or written of another, the injured party may recover without proof of special pecuniary damages. It can readily be perceived that other words may be used which in themselves are not defamatory, but which, when used under certain circumstances, may result in great injury to another.

What Constitutes Libel.

It may be stated as a general principle of law that any words are libelous which impute that the party to whom they refer has been guilty of a crime, fraud, dishonesty, immorality, vice, or dishonorable conduct, or has been accused or suspected of any such misconduct, or which suggest that the plaintiff is suffering from any infectious disorder, or which have a tendency to injure him in his office, profession, calling or trade. In fact, the courts have gone so far as to hold that to use words which hold the plaintiff up to contempt, hatred, scorn, or ridicule, and which by thus engendering an evil opinion of him in the minds of right-thinking men tend to deprive him of friendly intercourse and society, are libelous. It would be impossible to enumerate what words are libelous and what are not. To write of a man "I look on him as a rascal" is a libel; written accusations charging another with falsehood are libelous, but it has, singularly enough, been held that to charge one with being a "political" liar is not a libel.

A publication which imputes an unwillingness or refusal to pay just debts is libelous as tending to destroy the party's reputation for integrity and fair dealing. So it has been generally held libelous to publish or cause to be published one's name as a delinquent debtor or as one unworthy of financial credit. But when the charge does not affect a person in his business or profession, it is not libelous to publish of him that he owes money, or to charge him with mere inability to pay his debts, or with failure to pay his debts. To write that a man is slow to pay his debts is not actionable.

Any publication which charges another with being guilty of a breach of trust or betrayal of confidence is libelous. We use the word "publication" in connection with a libel as any writing, or print, such as a caricature, which passes from one to another; in connection with slander as words spoken by one to another who is not the party to whom they refer. It is interesting to note, in view of the political rivalries of today, that it constitutes a libel to charge another by any publication with political corruption, or the use of political influence or privilege for pecuniary gain, even though the party against whom the charge is made is not a public officer or a candidate for office.

To charge another by word of mouth with being a drunkard is not in itself a legal offense unless it implies a disqualification in connection with a man's business or employment. In many jurisdictions statutes have been passed providing that all words which from their usual construction and common acceptation are

considered as insults and tend to a breach of the peace are actionable.

The courts have recognized that it is the right and duty of newspapers to discuss measures relating to the morals, health, welfare, comfort and happiness of the public, but a newspaper is no more immune from liability for publishing libelous matter than is an individual. Editors have the full liberty to criticise the conduct and motives of public men, and the measures and policies of government, but the discussion must be fair and legitimate. If one goes out of his way to asperse the personal character of a public man and to ascribe to him base and corrupt motives, he must do so at his peril, and must either prove the truth of what he says or answer in damages to the party injured.

The law carefully guards the credit of merchants, traders and business men, and oral or written words imputing to them insolvency, bankruptcy or want of credit are actionable without any proof of special damage. A communication from a mercantile agency organized for mutual protection among business men is held to be privileged when made to one having an interest in the subject-matter. It has been held that defamatory words come under the head of what is known in law as "privileged communications" when published without malice to parties who have a common business interest in the subject-matter of the publication, even though it is false and injurious.

Privileged Communications.

Statements may be written derogatory of another under such circumstances as to exonerate the party writing them from liability. It is well settled that fair and honest criticism in matters of public concern is privileged. All political, legal and ecclesiastical matters are matters of public concern. Criticisms of books, public institutions, theatrical and musical performances are deemed to be privileged, however severe or caustic such criticisms may be.

The law recognizes certain communications as privileged from motives of pure public policy which under ordinary circumstances would be libelous. Libelous or slanderous matter published in the due course of a judicial proceeding is absolutely privileged. This rule has, of course, its limitations. This privilege which is given to individuals in the interest of an efficient administration of justice cannot be abused as a cloak beneath which to gratify private malice. Statements made by witnesses in the regular course of a judicial proceeding are absolutely privileged, as are likewise the deliberations of a jury.

Where a party makes a communication, and such communication is prompted by a duty owed either to the public, or to a third party, or the communication is one in which the party has an interest and it is made to another having a corresponding interest, the communication is privileged if made in good faith and without actual malice. This privilege is not lost by the fact that the communication, whether oral or written, is incidentally brought to the attention of others than those for whom it was intended. Where unnecessary publicity is given to a communication malice will be inferred. It has been held under this rule that a communication which would be privileged if sent by letter becomes unprivileged if sent by telegram.

Persons who join churches, secret societies, benevolent or temperance organizations submit to the jurisdiction of those bodies in matters of faith and individual conduct affecting their relations as members, and subject themselves to tribunals established by those bodies to pass upon such questions. Accusations made by one member against another, or words spoken or written in the course of an investigation or trial, are regarded as privileged. If one man in the course of a dispute with another makes certain inquiries the answer to such inquiries is privileged if such answer does not go beyond the question. Defamatory words do not become privileged merely because uttered in the strictest confidence by one friend to another, nor because uttered upon the most urgent solicitation. Statements regarding the character of a suitor or lover made in answer to inquiries by one interested, or when volunteered by one who is under a duty to make it on account of his relationship, are privileged if made in good faith. It should be remembered, however, that such communications if volunteered will not be protected merely on the ground that the parties making them hold friendly relations with those to whom the communications are made.

A communication regarding the character of an employee, made to the employer or to one about to employ such person is regarded in law as a privileged communication, when made in good faith of course; and this rule applies whether the information was voluntarily given or was in answer to an inquiry. However, if such a communication is made solely for the benefit of the informant, as, for example, for the purpose of compelling an employee to pay a debt due the informant, it is not privileged. To dictate a libelous letter to a stenographer or confidential clerk subjects the party doing so to an action for damages whether or not such letter was ever transmitted through the mails, or otherwise delivered or published.

When a man becomes a candidate for office his character for honesty and integrity and his qualifications and fitness for the position are put before the public, and are thereby made proper subjects for comment. False statements charging criminal or disgraceful conduct are not, however, privileged.

It is a general rule of law that in all civil actions of libel or slander, the defendant is justified and exempt from all civil responsibility where he alleged and established the truth of the matter charged as defamatory; the truth of the words spoken or written is a complete defense. Many of the states have enacted statutes to the effect that the truth is a defense only when published without malice. In other words, a man should be restrained from speaking the truth of another in an obviously malicious spirit, and without any apparent justification. One should be very cautious in what one says or writes of another, and should bear in mind that the fact that he believes what he says to be true is no justification if the words published are, as a matter of fact, false, and do not come within the classes of privileged communications above referred to. Furthermore, it is no justification that libelous matter was published first by another. It is unlawful for one to repeat information received which is of a defamatory nature.

It was pointed out that where words are published imputing to another a crime or contagious disease, or which disparage him in his office or profession, the law will presume that special damage has in fact resulted from their use. If, however, words are spoken (not written) which merely impute fraud, dishonesty or vice, no recovery can be had without proof of special damages.

The publication of defamatory words entitles the party defamed to compensation for the actual injury done him without regard to the motive with which the publication was made. Want of actual intent to injure furnishes no legal excuse. Consequently it is no legal defense that the defendant was drunk when he uttered a slander or that the publication was the result of an honest mistake.

An untrue statement disparaging a man's goods, published without lawful occasion and causing him special damage, is actionable. This rule applies, although no imputation is cast on the plaintiff's private or professional character. In a leading case on this point the defendants falsely published a detailed analysis of the plaintiff's artificial manure and their own, in which the plaintiff's manure was much disparaged and the defendants' extolled. Special damage having resulted, the supreme court sustained the plaintiff's right to recovery. Where,

in another case, a man wrote falsely that what another man sold as Turkish rhubarb was three parts brick-dust, the party whose goods were defamed was awarded damages. It is altogether proper for a man to commend his own goods or to advertise that he can make as good articles or even better than any other person in the trade. Competition between rival traders is allowed to any extent, so long as only lawful means are resorted to, but one should exercise care not to make false statements of the goods or property of another, for one renders himself just as liable if he slanders another's property as if he slandered his reputation.

Every one who requests, procures or commands another to publish a libel is as answerable as though he published it himself. One may be liable for publishing a libel which was composed by another, but merely composing a libel without publishing it is, of course, not actionable. To utter defamatory words in a foreign language is not a publication if no one present understands their meaning; but if defamatory words are written in a foreign language there will be a publication as soon as ever the writing comes into the hands of anyone who does understand that language, or who gets them explained or translated.

A letter is not a publication until it is read by, or in the presence of, some third person. If a man receives a letter with authority from the author to publish it, the person receiving it will not be justified, if it contains libelous matter, in inserting it in the newspapers. No authority from a third person will defend a man against an action brought by a person who has suffered from an unlawful act. If the receiver of a letter publishes it without authority he is from his own act the wilful circulator of slander. The sending of a letter containing libelous matter to the party defamed, where no third party hears or reads it, will not support a civil action. Sending a letter through the mail properly sealed is no publication, and the party sending it is not answerable for what the receiver may choose to do with it after it has once safely reached his hands. In this connection a certain case was recently decided where the defendant knew that the plaintiff's letters were always opened by his clerk in the morning, and yet sent a libelous letter addressed to the plaintiff, which was opened and read by the plaintiff's clerk in the usual course of business; the court held that this was a publication by the defendant to the plaintiff's clerk. Words spoken by a husband to a wife not in the presence of any other person do not constitute a publication within the meaning of the law of slander. The maligning of the memory of a deceased person is not cause of

action for damages in favor of his relatives where it does not affect their reputation. A corporation, although an artificial person, may maintain an action for defamatory words published of it concerning the trade or business in which it may be engaged. For words spoken of partners in connection with their trade, business or profession they may sue jointly.

Construction.

Words are to be understood in their plain and natural import, according to the ideas they are calculated to convey to those to whom they are addressed. In ascertaining the meaning of a speaker, reference is made to the words used and the circumstances under which they are uttered, and the author is presumed to have used them in the sense in which their use is calculated to convey to the minds of the hearers. In all cases of ambiguity the jury decides what meaning the words would convey to persons of ordinary intelligence. It is immaterial whether a slander or libel be in the form of a question, whether the language is ironical, figurative or allegorical; the insinuation from the words used may be indirect and the allusion obscure, but if the meaning of the words has injuriously affected another, the party guilty of such slander or libel must pay the damages, even though the defamatory words be disguised in a riddle or in hieroglyphics. The intention of the speaker is immaterial. He may have meant one thing and said another; if so, he is answerable for so inadequately expressing his meaning. If a man in jest conveys a serious imputation he jests at his peril.

Malice is an important element in all cases of libel and slander, and may be defined as any dishonest motive which induces the defendant to defame the plaintiff. The law always presumes that in the publication of an article that is libelous upon its face, it was published with malicious intent. If defamatory words are written or spoken in the heat of passion or under excitement produced by the immediate provocation of the party defamed this circumstance will be taken into consideration in assessing damages. Where an apology is made and defamatory words retracted, it does not exonerate the party using such words from liability in damages, but such an apology will be considered in mitigation of damages. A minor over the age of fourteen may be guilty of slander or libel. A servant or agent will be liable for any slander uttered on his master's behalf or by his master's orders. In any suit for slander or libel the plaintiff's bad character may be proved in mitigation of damages.

Trespass, Nuisance, etc.

Acts of trespass, nuisance and kindred infractions of the rights of others happen almost daily in every community. We will therefore direct our attention briefly to an analysis of the important elements constituting these offenses, a clear recognition of which will afford a valuable safeguard to everyone.

Any interference, however slight, which unlawfully disturbs another in the enjoyment of his property is a trespass. A trespass may be committed whether the injury is wilful or not, if the injurious act is the immediate result of the force originally applied by the defendant, and the plaintiff is injured thereby; for example, where the defendant cut trees on his own land and one accidentally fell on the land of the plaintiff, the latter may maintain an action of trespass. It has been held, however, that it is not trespass where an injury is caused by an altogether unavoidable accident. In a leading case an action of trespass was brought for driving against the plaintiff's horse and injuring him with the shaft of a gig; the court held that it was a good defense to this action that the horse was frightened by the noisy and rapid approach of a butcher's cart and became ungovernable, so that the injury was occasioned by an unavoidable accident. Anyone engaged in the prosecution of a lawful act is not liable for an accidental injury occurring during the performance of the act, when due care and precaution have been exercised. It is a trespass if an injury results by frightening another's horse by firing off a gun, if there was reasonable ground to think that the firing of the gun might frighten the horse. In a case recently decided the defendant untied the plaintiff's horse, and removed him from the posts to which the owner had fastened him, and which the plaintiff's right to use, if not exclusive, was at least as good as the defendant's. The court held that this act constituted a technical trespass, for which the plaintiff was entitled to recover damages.

In an action of trespass for entering plaintiff's house and removing a piano, it appeared that the plaintiff had hired it from the defendant who claimed to remove it for non-payment of rent. Plaintiff in this case kept his house locked against the defendant and he could not enter. In order to effect an entrance, this subterfuge was employed: an insurance agent, in the employ of the defendant, obtained admission upon pretense of examining the flues. Immediately afterward, defendant, with assistants, came to the house. Plaintiff's wife locked the front door against them, and requested the insurance agent to retire by the back door; instead of doing so and against her objections, he threw open

the front door, and the defendant and his aids entered and removed the piano. Although the entrance had been effected peaceably, it was done through a deceit and the court held those removing the piano liable in damages as trespassers.

One who aids, abets or incites in the perpetration of a trespass is liable as well as the direct perpetrator. Every man is liable for the consequences of his wrongful acts, even though the consequences might have been avoided by the exercise of care on the part of the injured person, and the liability is not lessened by the contribution to the result of any extraneous causes. A person can recover for the temporary interruption of his business and loss of time of his workmen occasioned by the blasting of rock by a contractor on a public work in the immediate vicinity of the plaintiff's building in such a negligent manner as to throw pieces of rock against the building, and cause the plaintiff's workmen to leave them under a reasonable apprehension of danger. If one agrees to a trespass which has been committed by another for his benefit, trespass will lie against him although the act was not done in obedience to his command or at his request. To render one liable for a trespass, it is not necessary that he intended to do the particular injury which followed. In cases of trespass the law looks to the damage done rather than to the intent. A rather unique case illustrating the point just stated was decided recently in New York State. In this case the defendant ascended in a balloon which came down in the plaintiff's garden, and a crowd of people broke the fence into the garden to assist the defendant there in peril from being entangled, and trod down the vegetables and flowers in the garden. The court held that the defendant was guilty of trespass and was liable for all damages done to the garden.

If a person commits a trespass against the person or property of another under a mistake, however honest, he is nevertheless liable for damages to the party injured. If a man cuts down trees on a church lot under instructions from persons whom he believed had the authority to regulate such things, he is liable for a trespass if the persons from whom he received his instructions had no such authority.

A man's house cannot be entered forcibly for the execution of civil process. It may, however, be entered to execute criminal process. Each part of a house occupied in two parts by two families may be a separate house in the eyes of the law if it has two entrances. Everything in which the law recognizes property may be the subject of trespass.

Trespass may be committed on the highway, by anyone hav-

ing the use thereof, against the owner of the property bordering on such highway, or by such owner against the public. The term "highways," in this connection, includes streets, turnpikes, roads and railroads. When a highway is blocked, by reason of some sudden or unexpected obstruction, the public have the right to pass over adjoining property, to get around the obstruction, and those doing so are not guilty of a trespass.

Generally speaking, adjoining property owners have a right to a reasonable use of the highway for swinging doors, windows or overhanging eaves. This right, however, is usually regulated by local ordinances. Where a man owns land over which others have a right of way, the law gives him such property in the right of way as will support an action of trespass on his part. Where lots are conveyed by descriptions bounding them by an alley with a right of way over the alley in common with other owners of property abutting thereon, the title passes, unless there are express words of exclusion, to the center line of the alley, subject to the private right of way, and for any injury to the soil or property affixed thereto the owner in possession of the adjoining lot may sue for a trespass.

It is not necessary that a man should erect a tangible boundary to his property in order to give him a right to punish anyone trespassing thereon. Trees on the line and other monuments belong to each of the adjoining owners, in the absence of any special agreement to the contrary. It has been decided that owners of adjoining land, with a division fence between them, built one-half by each, and established for more than twenty-one years, have not such an ownership in the materials of which it is made as will justify a removal by either of the portions built by him, against the consent of the other, and for such a removal an action of trespass will lie.

Fences are part of the freehold, even though they be accidentally detached from the soil. A fence built on the land of another belongs to him; if by agreement it is built on the boundary line, it belongs to both the adjoining owners.

Trespass may be committed by one who enters the land or property of another lawfully, but while on such another's premises does some unlawful act. One doing so becomes, to use a legal phrase, a trespasser *ab initio;* in other words he is held to be a trespasser from the time he entered the property of another. Where an act is lawfully done it cannot be made unlawful *ab initio* (from the beginning), unless by some positive act incompatible with the exercise of the legal right to do the first act. That is, the mere intention of doing a subsequent illegal act will not render the first act unlawful.

Everything in which the law recognizes property may be made the subject of a trespass. A dog is a species of property, and an action of trespass will lie on the part of the owner against anyone injuring his dog. This principle, of course, applies in the case of all domestic animals or wild animals which have been reclaimed. A person may have a property in bees. Hiving or enclosing them gives a man property in them. It has been held that if a swarm of bees fly from the hive of the owner, his property or ownership therein continues only so long as he can keep them in sight, and possesses the power to pursue them. The owner may bring an action of trespass against a person who cuts down a tree into which the bees have entered on the soil of another and takes the honey.

The authorities hold that in the case of oysters planted by an individual in a bed clearly designated in a bay or arm of the sea, which is a common fishery, they are the property of the one who planted them, and who may sue anyone taking them for a trespass.

It is not necessary for the owner of property to show special damages in order to sustain an action of trespass. Ordinarily, however, the measure of damages is the actual value of the property destroyed, and such damages are given as a compensation to the damaged party for the injury done. The spirit which actuates a party committing a trespass enters largely into the question of damages. If no perceptible injury results from a trespass, nominal damages only are awarded.

Nuisances.

Closely akin to the subject of trespass is that of nuisances. The term "nuisance," which literally means annoyance, may be legally defined as any act which interferes with the lawful enjoyment of life or property by another.

A public nuisance is an act which affects the rights enjoyed by citizens as part of the public, that is, the rights to which every citizen is entitled; whereas a private nuisance is any damage, annoyance or detriment to the land or property of another which does not amount to a trespass. For example, any unreasonable or unlawful use by a person of his own property which is an injury to another constitutes a private nuisance.

To constitute the condition or use of premises a nuisance some legal right, public or private, must exist, and some material annoyance, inconvenience or injury must result from the invasion of that right.

There must be some such real damage as a sensible person,

if subjected to it, would find injurious, regard being had to the situation and mode of occupation of the property injured. The motive of a person is immaterial, for where there is in fact a nuisance, the person causing the same is liable, although he did not act maliciously or with an intention of annoying his neighbors. It may be stated as a general principle of law that in order to constitute a legal nuisance the act of man must have contributed to its existence, and any injury which results from natural causes cannot become a nuisance. Any unlawful use by a person of his own property in such a way as to cause material injury to another or to the public generally constitutes a nuisance. The test applied to determine whether a business lawful in itself or a particular use of property constitutes a nuisance is the reasonableness of conducting the business or making use of the property complained of in the particular locality, and in the manner and under the circumstances of each particular case. A business which might be perfectly proper in a business or manufacturing neighborhood may become a nuisance when carried on in a residential district. In a leading case it was held that where defendant, a hotel proprietor, placed in his kitchen and used in his business a large cooking range, with a shaft for hot air which interfered with the comfort of plaintiff's house, by overheating his wine cellar, the plaintiff was entitled to an injunction to restrain the nuisance thereby caused to him.

The fact that a place is a manufacturing locality does not, however, justify an extraordinary use of property, introducing a serious annoyance in addition to those arising from the ordinary use of property; and no matter how lawful a business may be in itself, or how suitable in the abstract the location may be, the courts have held that these circumstances cannot avail to authorize the carrying on of a business which substantially damages the property of another, or causes unnecessary annoyances to persons in the vicinity.

It should be remembered that it is the character of the locality at the time of the annoyance complained of that governs. To illustrate, a locality which was originally residential may have lost that character and become a business or manufacturing neighborhood; and, consequently, the annoyance incident to such locality cannot be complained of by an old resident. On the other hand, the fact that an offensive trade or use of property was originally established in a place remote from buildings and public roads does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood, to the occupants of which and to persons passing

which it is a nuisance. Cases of this character have arisen frequently, and a business man contemplating the construction of an establishment for the operation of a business should consider the effect which the nature of the business will have upon the locality in which it is situated. No definite rule can be given to govern all cases, as every case must depend upon the particular circumstances which characterize it. In a comparatively recent case, it was decided that where the defendants are charged with maintaining a public nuisance by operating an oil refinery in a city, which emitted offensive vapors, and in which were stored inflammable and dangerous oils and gases, the character of the location where the refinery was established, the nature and importance of the business, the length of time it had been in operation, the capital invested and the influence of the business on the growth and prosperity of the community are proper matters to consider in determining whether or not it is a public nuisance.

A person who lives in a city or large town must of necessity submit himself to the consequences and obligations of the occupations which may be carried on in his immediate neighborhood, which are necessary for trade and commerce and also for the enjoyment of property and the benefit of the inhabitants of the place. But although people live in cities they are entitled to enjoy their homes free from damaging results by smoke, soot, etc., sufficient to depreciate the value of their property, or render their occupancy uncomfortable.

A business which, when properly conducted, would give no legal ground of complaint may become a nuisance through being conducted in an improper manner or carried on at unreasonable hours, so as to cause unusual or unnecessary annoyance to another. If a particular use of property causes a nuisance, this fact is sufficient to entitle a person injured thereby to redress.

A nuisance cannot be justified by the existence of other nuisances of a similar character, if it happens that the inconvenience is increased by the nuisance complained of.

There is a very marked distinction to be observed in reason and equity between the case of a business long established in a particular locality, which has become a nuisance from the growth of population and the erection of dwellings in proximity to it, and that of a new erection or business threatened in such vicinity. It requires a much clearer case to justify a court of equity in interfering by injunction to compel a person to remove an establishment in which he has invested his capital and been carrying on business for a long period of time, than would be required to prevent the establishment of an objectionable business by one who

comes into the neighborhood proposing to establish such a business for the first time, and who is met at the threshold of his enterprise by a remonstrance of the inhabitants. If a person moves into a town or neighborhood where, by reason of the industries established, certain annoyances prevail, he will have no right to restrain the continuance of such industries. It has been decided that the purchaser of land near an existing cemetery, although aware that the same is a nuisance, is not bound to submit to the nuisance created by an enlargement of the cemetery. Where a tenant knows of the existence of a nuisance affecting the value of property when he leases it, he has no right thereafter to complain of it or recover damages therefor, provided the nuisance is not increased during the term of his lease.

The mere fact that an act is prohibited by law does not render the doing of such act a nuisance; and where a building or structure is not in itself obnoxious or dangerous, the fact that it is constructed in violation of a city ordinance does not render it a nuisance which would entitle the owner of adjoining property to obtain an injunction.

The courts have held that the playing of the game of baseball is not a nuisance to the owner of property adjoining the place where it is played. If in conducting a baseball game spectators habitually trespass on the grounds of another, profane language be indulged in, or the property of another be damaged by flying balls, it is, of course, a nuisance, which may be enjoined. The constant barking and howling of dogs is regarded as a nuisance, and everyone injured in this manner may obtain relief by an action at law. A billiard or poolroom is not of itself a nuisance, but may become such where it causes annoyance and disturbance and injuriously affects property interests in the vicinity. A carpet-cleaning establishment in a thickly-settled neighborhood of private residences is a nuisance when the dust and moths from it permeate the neighboring houses. Blasting operations, excavations and the manufacture and storage of explosives are nuisances unless every safeguard (which a prudent man could adopt to prevent injury to adjacent property owners) is used. The placing of any object on the highway which is calculated to frighten horses is a nuisance and may be enjoined.

The variety of acts and omissions which may constitute a nuisance is so great as to render an enumeration impossible; no particular combination of sources of annoyance being necessary to constitute a nuisance, and the possible sources of annoyance not being exhaustively defined by any rule of law.

The injury, or annoyance, which will warrant relief against

an alleged nuisance must be of a real and substantial character. If the injury or inconvenience be slight or trivial or fanciful, or one of mere delicacy or fastidiousness, there is no nuisance in a legal sense. Thus the law will not declare a thing a nuisance because it is unsightly or disfigured, or because it is not in a proper and suitable condition, or because it is unpleasant to the eye and a violation to the rules of propriety and good taste; the law does not cater to men's tastes or consult their convenience merely, but only guards and upholds their material rights and shields them from unwarrantable invasion. The question in all cases is whether the annoyance produced is such as can materially interfere with the ordinary comfort of human existence.

The person primarily liable for a nuisance is he who actually creates it, whether on his own property or not; one who, either by negligence or design, furnishes means and facilities for the commission of an injury to another which could not have been done without them is equally responsible with the immediate wrongdoer, as all are regarded as principals in maintaining a nuisance. Consequently one who merely contributes to the creation of a nuisance is liable therefor, although it has been held that such a person is liable in damages only for that injury or loss which is the direct and proximate result of his acts. Anyone who permits the establishment of a public nuisance upon property under his control is liable therefor. A person cannot escape liability for the maintenance of a nuisance on the ground that in so doing he acted only as the agent of another.

If a man erects a nuisance on his land, he cannot escape liability for damages caused thereby by a conveyance of the property; and his liability extends to a continuance of the nuisance subsequent to his conveyance, where he is shown to derive some benefit from its continuance. Likewise one who erects a nuisance on his premises cannot escape liability by leasing the same; and his liability extends to the continuance of the nuisance after the lease goes into effect. A tenant in possession is liable for a nuisance on the premises which is due to his act or failure of duty, and the landlord is not liable for damages which result from a nuisance which it is the tenant's duty to remove or repair. One who leases property for a purpose which must prove injurious or offensive to others is liable for the injury resulting therefrom.

It is well recognized in law that all persons concerned in the creation or commission of a nuisance are liable for damages.

Remedies for Nuisances.

The remedies for nuisances are threefold; preventive, compensatory and punitive. The first is again divided into the remedy by abatement, without process of law, and by injunction. The compensatory remedy is an action at law for damages, while the punitive remedy is in the nature of an indictment on behalf of the public.

The most efficient and flexible remedy is that of injunction. Under this form the court can prevent that from being done which if done would cause a nuisance; it can command the destruction of buildings or the cessation of works which violate a neighbor's rights; where there is a disputed question of right between two parties the court can suspend the operations complained of until that question is finally decided. Furthermore, the orders of the court may be either absolute or conditional upon the fulfilment by either or both of the parties of such undertaking as appear to the court just in the particular case.

In order to obtain an injunction against a nuisance, it must be shown that the injury complained of, as present or impending, is such as by reason of its gravity or its permanent character cannot be adequately compensated in damages. The injury must be either irreparable or continuous. The remedy by injunction is, therefore, not appropriate for injuries which are temporary or intermittent, or accidental and occasional, or for an interference with legal rights which is trifling in amount and effect. Long acquiescence in the existence of a nuisance will forfeit the right to apply to a court of equity to stop the same by an injunction.

A public nuisance does not furnish grounds for an action either in law or equity by an individual who merely suffers an injury which is common to the general public. However, an individual who sustains an injury peculiar to himself may have relief against a public nuisance and is entitled to proceed in equity for the abatement of, or an injunction against, such nuisance, or he may maintain an action at law for damages on account of the special injury which he has received. The number of persons who are specially injured by a nuisance does not affect the right of action for such injury or make their injury identical with that of the public at large, but any of such persons may maintain an action for the nuisance, and the fact that several persons join in a suit to abate a public nuisance does not show that each of them may not have sustained such special injury as entitles him to relief.

It is well established that a person who is aggrieved by a

private nuisance has the right to abate the same by his own act without instituting any legal proceedings. On this principle a person may kill a dog which haunts his premises and by barking and howling becomes a nuisance; one may cut off branches of a neighbor's trees overhanging his land, remove a part of an adjoining owner's wall which overhangs his premises, or cut off the eaves of a building overhanging his property.

To justify a person in abating a nuisance by his own act, the nuisance must cause a particular injury to his person or property at the time when he undertakes to abate it. It should be borne in mind that the remedy of abatement by the act of the person injured should be resorted to within a reasonable time after the creation of the nuisance, as the right to so abate may be lost by acquiescence in the injury for a considerable time. Where a nuisance can only be abated by going on the land of another person, from which the nuisance proceeds, the person desiring to abate the same must give previous notice to the owner of the land to remove the nuisance. Where one proposes to abate a nuisance merely by doing acts upon his own land, without trespassing upon the land of his neighbor, no previous notice to abate the nuisance is necessary.

A person abating a nuisance must not in so doing be guilty of any excess, or inflict any unnecessary injury. If a person assumes to be the judge in the first instance as to the existence of a nuisance, when he undertakes to abate the same, without legal proceedings, he acts at his peril and assumes all liability for exceeding his legal right. Such a person could be held liable in damages if it is proven that what he destroyed was not a legal nuisance so injuring him as to give him the right to abate it. It is consequently inadvisable for any one to attempt to personally abate a nuisance unless the circumstances of the case relieve it from all doubt. The person responsible for a nuisance may be held liable for the expense of removing it.

Where there is danger of irreparable injury resulting from a nuisance, a court of equity may order a preliminary injunction, restraining the defendant from creating or continuing the nuisance until complainant's right to relief can be thoroughly investigated and disposed of. If injuries result from a nuisance permanently affecting real estate the measure of damages is the difference between what the property would have sold for before and after the injury. For nuisances affecting health and personal comfort, injury sustained not only by the plaintiff, but also by members of his family, whom he is bound to support, is a proper element of damage. It is well established that anything which is authorized

by the legislature cannot be a nuisance. By this, however, a public nuisance is meant, and there may be, notwithstanding the legislative authority, a private right of action for damages. To hold otherwise would be to hold in effect that one's property may be taken without compensation, which is clearly contrary to the constitution.

Malicious Prosecution.

Public policy has always favored prosecutions for crimes, and affords such protection to the citizen causing the prosecution of another in good faith and on reasonable grounds as is essential to public justice, without the sacrifice of the right of the individual. Likewise free access to courts of civil jurisdiction is provided in every state for the administration of the law of the land. An action for malicious prosecution does not lie merely because a suit has been brought either criminally or civilly and has terminated unsuccessfully. However, the right of one person to bring an action against another has been so seriously abused that it has become necessary to restrict this right in order to safeguard individual liberty. Consequently where either a criminal or civil proceeding has been commenced or continued without probable cause, but with malice, and has terminated unsuccessfully, the injured party may recover damages which he has sustained to his person, property, or reputation as the result of the wrongful institution of such legal proceedings.

Elements of Action.

In order that an action for malicious prosecution may be maintained three elements must concur: (1) The motive of the party instituting the original proceedings must have been malicious; (2) the suit or proceeding complained of must have been instituted without any probable cause; (3) the suit or proceeding must be terminated. Everyone is in duty bound to act fairly, honestly and without malice toward every other one. This is a moral duty, but becomes a legal and concrete one when the machinery of the law is called into motion. It is for the infraction of this duty that the action for malicious prosecution lies. By the term "malice" is meant any indirect motive of wrong. In a legal sense, any unlawful act which is done wilfully, and purposely to the injury of another, is, as against that person, malicious. It is an action based upon an improper motive, and does not necessarily presuppose hatred, ill will or revenge. It may be a mere wanton or careless disregard for the rights of others, or the doing of the acts complained of without that ordinary prudence

and discretion which persons of sufficient age and sound mind are presumed to have. If probable cause existed for the bringing of a legal action the motive becomes immaterial.

As we have seen, in order that an action for malicious prosecution may be maintained, the plaintiff must show that the defendant had no probable cause for the commencement or continuation of the proceeding complained of. Probable cause has been defined as that reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused or sued is guilty of the offense or wrong charged. It has been held that the mere knowledge and consent of one partner that another partner should have a person accused of defrauding the co-partnership arrested would not render the partner, so knowing and consenting, liable to an action for malicious prosecution. It is necessary that the consent should be of such a character as to amount to advice and co-operation. There is, however, respectable authority holding to the contrary of this rule. Corporations are liable for malicious prosecution to the same extent that individuals are liable under similar circumstances. It is generally conceded that a person who, after consulting counsel in good standing and fully disclosing the facts of his case within his knowledge, acts upon the advice of such counsel, is not liable in a suit for malicious prosecution for bringing such action. The advice of counsel must, however, be sought and followed in good faith and not as a subterfuge. It is no defense to act under the advice of a justice of the peace in suing another.

Bad Checks.

Practically all states now have by statute made it a criminal offense to draw, utter or deliver a check, when the person so doing knows at the time that he does not have enough money in the bank to meet the check. However, in some states, it must also be proven against him that he did it with intent to defraud and actually did obtain either money or goods by reason of such fraud. In Pennsylvania, the law makes it *prima facie* evidence of intent to defraud if the person passing the check does not make it good after having been given ten days' notice of the dishonor of the check.

MOTOR VEHICLES

The automobile has become so interwoven in the national life of America as to make the law in relation thereto a matter of universal interest. The word "auto" is derived from the Greek word "autos," meaning self. The French word "mobile" originates from the Latin "mobilis," meaning movable. The word "automobile," therefore, embraces any self-movable vehicle.

Manufacturers.

The law imposes the duty on the manufacturer of a motor vehicle to use the kind of material suitable for the purposes for which the article is being constructed, to do the work in a workmanlike manner, to make a vigilant inspection of the materials, and to employ every known test by which defects may be detected. If the manufacturer, on selling a defective machine, points out the defect to the purchaser, or if it is obvious and the purchaser buys the machine with knowledge of the defect, and subsequently, in turn he sells it to a customer of his own, and the last mentioned person using the machine suffers injury by reason of the original defect, then the manufacturer is not liable.

The general rule of law in America is to the effect that the manufacturer of an automobile is liable to the general public for injuries caused by defective cars, upon the theory that the manufacturer owes the public the duty to take all possible precautions so that their cars shall be safe for the purpose for which they are designed. A manufacturer will not be absolved from the duty of inspection because he bought wheels from another reputable manufacturer, it having been held that "It is every bit as dangerous to put upon the market an automobile with rotten spokes, as it is to send out to the trade rotten foodstuffs."

Sales.

In the majority of the states it is required by statute that the sales of motor vehicles should be recorded, the object being to curb theft. Titles are issued by the state, and the transfer of the title must be recorded. A purchaser should comply strictly with the requirements of his state as to recording.

The usual modern rules as to husband and wife apply to motor vehicles. When bought and paid for by the wife out of

her separate estate, the automible is hers, and not subject to attachment by the creditors of her husband, but the husband may acquire full legal title on a purchase from a third person, although the wife furnished the consideration. The Uniform Sales Act, which we discussed in a previous chapter, requires a contract of sale involving five hundred dollars or more to be in writing. In order to enforce a contract for the purchase of an automobile costing over five hundred dollars care should be taken to have the contract reduced to writing.

Where the buyer of an automobile discovers fraud in the representations made to him as to its condition he has his election either to rescind the contract or to affirm it and bring an action to recover damages. A false statement made to induce a sale and relied upon as to the age or model number of a car sold is a false statement of a material fact which furnishes the basis for rescission. It is the duty of the buyer of an automobile under an implied warranty to inspect it within a reasonable time after its receipt and if defects are found constituting a breach of the implied warranty to refuse to accept it. The inspection and rescission must, however, be promptly made. Where the contract of sale contains a guarantee that the car is in good condition and also an agreement that the seller should keep it in good order for a fixed period of time, the buyer is not entitled to rescind on discovering a fault in the shaft or any other minor defects, as the seller under his contract has a right to be given an opportunity to repair such defects. Where the contract contains a guarantee by the seller to keep the car in good running condition for a certain period, and the buyer three times having returned it for repairs, he may be held to have waived his right of rescission and to have relied on his guarantee.

The right of a manufacturer to control the resale price of his product has been the subject of a hectic controversy in the courts in recent years, and while it cannot be said that the subject is yet wholly clarified by judicial decision, still certain general principles for the guidance of a manufacturer can be safely laid down. Any manufacturer may make any contract with his own agent that he desires. He may require the agent to sell at a price fixed by him, and the agent is bound to follow the manufacturer's orders in this respect. Most automobile manufacturers make sales direct to their dealers and look to them for the purchase price whether the dealer markets the machine or not. This transaction raises at once the question whether the seller has any right to control the price at which it shall be resold to the public, and it may be laid down as a result of the decisions

that the Federal Courts will not enforce contracts of this nature, but, on the other hand, a manufacturer will not be convicted under the Sherman Act for refusing to sell to dealers who cut prices.

A manufacturer can under a conditional bill of sale retain title and control of his product until he is paid in full for it, and a condition retaining title until the automobile is resold at the stipulated price will be sustained.

A combination of automobile dealers to fix prices may be illegal, but one manufacturer of a car even so common as a Ford, cannot be charged with restraint of trade in attempting to fix the price of his product. Such an attempt is not a restraint of competition as the public is left free to buy other cars if they do not wish to buy at the price fixed.

The regulations governing the registration of motor vehicles, the licensing of the owner, driver or dealer, together with the laws governing speed, lights and license tags are too diversified to incorporate in a book of this character. A synopsis of the motor vehicle laws for all of the states and territories may be obtained from the American Automobile Association, and the reader is advised to familiarize himself with the laws effective in his own locality.

Insurance.

Concurrent with the purchase of a motor vehicle and the registration thereof, the matter of insurance invites the new owner's attention. It is fundamental as a public policy that no policy of insurance is valid when taken out by one who has no interest in the thing insured, and that is usually stated in the words that "the insured must have an insurable interest." A policy insuring an automobile in which the owner has no interest is void, although the company assents to the arrangement, and the policy will be forfeited for change in the ownership of the car. A contract by the seller to keep the buyer insured against liability while using a car furnished him temporarily, pending the arrival of his own car, is not void as against public policy. A buyer under a contract of conditional sale has an insurable interest in the car.

A misstatement in an application for a policy of the year of the car, is a material misrepresentation avoiding the policy. The insurance ordinarily sought by the owner of an automobile is insurance against fire, theft, property damage, collision and personal liability. The general principles of insurance law are of course applicable to the different kinds of automobile insurance,

the reader being referred to the chapter on insurance as to the necessity of making truthful statements of every material fact associated with the risks insured against, and should strictly comply with the requirements of the policy as to filing claim and proof of loss.

Driving a car at high or unsafe rate of speed or in a manner such as to convict the insured of negligence, does not necessarily deprive the disaster which he suffers of its character as an accident, nor does it conclusively negative a finding that his injury or death was caused by accidental means. If an injury to an insured person results in some degree from his own acts, and the evidence establishes that such a result is one which he did not and could not reasonably have anticipated, and did not intend to produce, it is an accident and is caused by accidental means under the terms of an accident policy.

It is no defense to an action on an automobile fire policy that the fire was caused by the negligence of the owner. Under a policy of fire insurance the Company is liable for unreasonable delay in making the repairs caused by fire, and likewise for depreciation through improper care during the making of such repairs.

The owner of a pleasure automobile, insured against fire under a policy forbidding the use of the car for hire, should be careful not to so use it himself, and also forbid such use by his chauffeur or other member of his family. Where a fire insurance policy provides that an automobile shall not be used for carrying persons for hire, it is broken where the owner's son, with the owner's knowledge and consent and for compensation makes trips with passengers. A breach of this condition would not only preclude any right of recovery under the policy, but would also forfeit the right to a return of any part of the paid premium. An automobile insured against fire should be used only for the purpose designated in the policy. Any other use forfeits the policy. Care should be taken not to keep a car on premises where gasoline or petroleum is "kept, used or allowed." To do so would invalidate the ordinary fire insurance policy on an automobile.

Automobile owners before taking out liability insurance should satisfy themselves that the insurance company has the requisite authority to issue such policies, as authority to insure automobiles does not include the power to insure against liability for injuries occurring in their operation. An insurance company authorized to insure against personal injuries resulting from travel or accident is not authorized to insure against legal liability for negligence.

Where an automobile owner has property insurance he may settle with the insurance company without affecting his chances for recovery against the one whose negligence caused the injury to his car. It is the general rule that in the absence of statutes requiring actions to be brought by the real party in interest, the owner of any other property which has been injured or destroyed by another, may himself bring an action for the loss regardless of whether he has been reimbursed for the loss by the insurer. So where the owner of an automobile has been partially reimbursed for damages in an accident by an insurance company, it is no defense to his action against the wrong doer that he has settled with the insurance company and given it a release which subrogates the company to his right of recovery for such loss to the extent of the payments. In such a case the matter of the distribution of the recovery is one concerning only the owner and the insurance company, with which the wrong doer is not concerned.

The courts have uniformly held that to recover on a policy insuring against theft, criminal intent must be shown, as the insurance policy protecting against theft of an automobile covers larceny as known to the law, and must necessarily include intent to steal. Where one takes a machine without permission for a joy ride, there can be no recovery under the policy when injury to the vehicle occurs. The evidence must show an intent to permanently deprive the owner of his car. An insurance company is not liable on a policy covering "theft, robbery or pilfering" on evidence that an employee of the plaintiff took the machine without permission and damaged it, unless it also appears that he intended to steal it. If an insurance company recovers a car, it should return it to the place where it was stolen, and pay damages by reason of the theft, the insurer being liable for the total value of the car wrecked after being stolen.

Garages.

Of all modern occupations few have been more rapid and widespread in development than garages. In applying the law to this new avocation resort must be had to the principles relating to livery stable keepers, warehousemen and to those which apply to repairmen in general lines of employment. A garage, in legal parlance, is "a depot for the storage of or storage and repair of motor cars." One who is engaged in the business of running a garage in which automobiles are stored for repair is subject to a fee as a public garage keeper, although no fee is charged for storage where charges are made for repairs and vehicles are stored for repairs. The storage of motor vehicles in a garage is a form of

mutual benefit bailment, the garage keeper being what is commonly called a bailee for hire, and the relation of the parties to the bailment is one of contract either express or implied. A garage keeper holds the motor vehicle for no other purpose than to care for it during the continuance of the relation in accordance with the contract, and redelivering it to the bailor upon the termination of the relation. He has no title to the automobile, except the right of possession vested in him as bailee and that right is paramount to any claim except that of title by the owner. The liability of the garage keeper as bailee does not begin until he has acquired possession and control of the machine, and it continues until the possession and control is surrendered to the bailor. Garage keepers as bailees for hire are bound to take the same care of automobiles entrusted to them that men do of their own property. They are required to exercise such ordinary care as a man of ordinary prudence and discretion ought to exercise, and would be expected to exercise under all circumstances if the property was his own, although he is not an insurer. A garage keeper is bound as a matter of ordinary prudence to drain the water from the radiator during cold weather, or maintain sufficient heat in the garage to prevent freezing. A garage keeper is likewise bound to know who his bailor is, and can have no legal reason for making a mistake in delivering the car to the wrong person. A garage keeper has no right to use a machine, placed in his custody for storage, in any way inconsistent with the bailment. A garage keeper who fails to lock the garage or keep it in the care of a trustworthy attendant is liable to the owner if either the car or any personal effects therein are stolen. The usual rule applies to garage keepers that as a bailee for hire he cannot by contract so limit his responsibility that he is not liable for his own negligence. Reasonable diligence is required to be exercised by a garage keeper, and this applies to the place in which he stores the property, and the kind of care and custody he gives to the property while in storage. With the constant progress in the appliances connected with automobiles what have been considered proper conditions a few years ago may be improper at the present time. In other words, the diligence of yesterday may be the negligence of today, and the custodian for hire is bound to keep pace with modern advancement in the line of his business. By doing so he escapes liability when loss or injury comes to the property entrusted to his care. If he fails, he has failed to be ordinarily diligent and is legally liable for the damages that will result because of such failure which we classify as negligence.

The garage keeper is not liable for any loss or injury caused

by an act of God, as for example, lightning, earthquake, tornadoes, or storms of unusual violence; nor is he liable for losses occasioned by acts of a public enemy, or caused by unavoidable accidents, such as fire, burglary and the like, unless by the exercise of ordinary diligence loss by reason of these causes could have been averted.

If a garage keeper engages in the business of hiring out motor vehicles, it is his duty to exercise reasonable care in their inspection and to provide competent chauffeurs. He is not liable for a latent defect, as where a brake rod breaks, but he is responsible where he rents a car known to be defective, or where such defects could have been ascertained by a careful inspection. The obligation extends to the guests of a man hiring the machine.

The owner of an automobile who desires to have same repaired at a garage should bear in mind that the relationship of the garage man who receives an automobile for repairs with the owner is that of bailor and bailee and not the relation of master and servant.

A chauffeur by virtue of his position does not possess implied authority to contract for general repairs, but while in travel he may bind his employer in ordering such repairs of a temporary character that will enable him to continue his journey. He has no authority to contract for repairs of a permanent character.

A garage keeper cannot generally recover for repairs made where he has no express order from the owner or his duly authorized agent. It is incumbent on a garage keeper, undertaking to repair a car, to see to it that the work is done in strict accordance with the contract. An itemized estimate in writing should be obtained which would obviate many disputes arising out of the repairs of automobiles. If, however, this precaution has not been taken, there are certain implied obligations that apply to every undertaking: there is, for example, the implied undertaking that the work will be done in a good and workmanlike manner, using such skill as is ordinarily possessed by a mechanic attempting a similar kind of work, such as the workman claims to possess. In this species of bailments every man is presumed to possess the ordinary skill requisite to the due and proper exercise of the art or trade which he assumes. He is expected to apply that skill with diligence and is liable for his failure so to do.

In a suit for repairs to an automobile, the owner may show that certain repairs were improperly done and had to be done over, and may show by an expert the cost of repainting or other work necessary by reason of the negligent manner in which the repairs were made.

If the owner gives a note to a garage keeper to obtain his car, on which the latter is claiming a lien for repairs, he cannot subsequently refuse to pay the note on the ground that the repairs were improperly done.

Both at common law and in equity garage keepers have a lien upon a car to secure storage charges. A lien is defined in Anderson's Law Dictionary as, "A hold or claim which one person has upon the property of another as a guarantee for some debt or charge; a right to possess and retain property until some charge attached to it is paid or discharged."

A mechanic who furnishes labor and materials in connection with the repairing of an automobile has a lien thereon to the extent of the charges properly due him. Neither the garage keeper nor the mechanic can claim a lien against a car where the owner of the car neither expressly or impliedly authorized the storing or repairing. The lien to which a garage keeper is entitled is ordinarily created and governed by statute. A statutory lien for repairs to an automobile will be lost where the repairman delivers the car to the owner, and if the owner subsequently brings in the car for more repairs the lien does not revive and the garage keeper will lose his lien where he delivers the car to a third person, who turns it over to the owner, as the lien vesting under the statutes depends upon possession.

Operation.

After having purchased or leased a motor vehicle, having same duly registered or licensed, and having secured the desired insurance and having arranged for its storage, the operator, whether owner or chauffeur, requires to be advised as to his duties and obligations in connection with the operation thereof. It is timely to observe that the first precaution which the driver of a motor vehicle should exercise is to abstain from the use of intoxicating beverages. To operate an automobile while under the influence of intoxicating liquor has been made a criminal offense by statute in practically every state of the Union. The adoption of the 18th Amendment, with the passage of the Volstead Act, and enforcement legislation by most of the states, has added greatly to the liabilities of those interested in motor vehicles. Under such legislation an automobile used in the transportation of intoxicating liquor is subject to forfeiture. Provisions for the forfeiture and sale of automobiles used in the illegal transportation of liquor are a valid exercise of the police power, and even an innocent mortgagee cannot complain that he has been deprived of his property without due process of law, as the seizure and

forfeiture of an automobile, used in transporting liquor, is a proceeding *in rem*, the automobile being declared a nuisance and its forfeiture justified as an abatement thereof.

The decisions regarding the rights of innocent persons interested in motor vehicles seized for transporting liquor are in inextricable confusion, which results from the difference in the point of view of the courts which have been called upon to consider these statutes. In strict legal theory the proceeding is *in rem*, against an offending automobile, the automobile being regarded as at fault, and for its crime is condemned to be sold. Under this theory the knowledge or acquiescence of the owner in its illegal use is unimportant. This view has been expressed by the Supreme Court of the United States, but many State Courts under local statutes have taken the more liberal view that the automobile is not the offender, but that its forfeiture is merely a means of enforcing the law and punishing the criminal, and therefore when the owner is entirely innocent, his interest should not be forfeited.

One of the penalties universally enforced for operating a motor vehicle while under the influence of liquor is the forfeiture of the license.

Duty as to Equipment of Motor Vehicles.

It is a general rule of law that before operating an automobile the owner must see to it that the same is in good order and condition and is in no way a menace to the safety of others using the public highways. To insure harmless operation it is essential that the motor vehicle shall be supplied with all proper safety appliances, and be kept in such good order and repair as will on all occasions confer instant and complete control upon the operator. Safety appliances for motor vehicles are required by the law of practically every state. In general, they include a suitable bell, horn or other device for signalling, proper lamps, adequate brakes and a mirror giving vision to the rear.

As automobiles are commonly constructed, the lives and safety of the public, as well as of pedestrians, primarily depends upon the sufficiency of the brakes at all times and under all circumstances to stop the vehicle and to hold it stationary, and upon the steering apparatus to effectively direct its motion. The third appliance or means is the clutch which enables the operator at will to control the influence of the engine upon the driving wheels of the car. Without belittling any of the other appliances and the necessity of keeping them in serviceable condition, the three

particularly mentioned seem especially to demand a high degree of care.

Where the law requires the use of a mirror, it is negligence to drive without one, where the car is so enclosed by a curtain that the operator cannot see to the rear.

In the operation of a motor vehicle the driver is required to exercise ordinary care under the circumstances. The standard of care imposed by the law is that of a man of ordinary prudence under similar circumstances. Failure to exercise ordinary care will render the operator of a motor vehicle liable to respond in damages for the natural consequences of his negligence.

The driver of a motor vehicle is required to know and observe the traffic regulations effective in the district through which he is travelling.

Liability for injuries inflicted on a third person by the operator of a motor vehicle is based entirely on the theory of his negligence, and negligence, as we have observed, is merely the failure to exercise ordinary care under the circumstances of a particular accident. If some unforeseen emergency occurs which naturally would overpower the judgment of the ordinarily careful driver of a motor vehicle, so that momentarily or for a time he is not capable of intelligent action, and as a result injury is inflicted on a third person, the driver cannot be held to be negligent. The law does not require supernatural poise or self-control. No one can safely drive a motor vehicle amid the distractions and dangers encountered on a modern highway who is not reasonably steady of nerve, quick in forming opinions and calm in executing a design. If one does not possess ordinary skill in driving, it would be negligence for him to attempt to do so, and it has been held to be negligence for one of defective faculties to attempt to drive a motor vehicle, such as an aged person with defective sight and hearing.

The relation existing between the owner of an automobile and the chauffeur he employs to operate it for him is that of master and servant, and the general rules of law applicable to that relation apply, for a discussion of which the reader is referred to the chapter on Domestic Relations. Suffice it to say in the present connection that the owner of a motor vehicle is responsible to a third person for any injuries resulting from the negligent operation of his machine on the part of his chauffeur or other agent or employee delegated by the owner to operate the machine for and on his behalf and in the promotion of his business.

In all cases where negligence or the violation of a duty in operating a motor vehicle is concerned, it is never to be forgotten

that irrespective of whoever else may be liable to the injured person, the operator is the one primarily responsible. In civil actions the person injured may sue either the chauffeur or the owner, or both, although it is common practice to bring suit against the owner as the one financially responsible.

It is no defense in a criminal prosecution for the chauffeur to plead that his violation of any law or duty was in obedience to the command of his employer.

The law imposes on every municipality or county government the duty of maintaining its highways in a reasonably safe condition for public travel. A failure to discharge this duty would render the county or municipality liable to any one injured as a result, provided they did not contribute to the accident by their own negligence.

The driver of a motor vehicle must take all reasonable precautions for his own safety, and, therefore, if he fails or should have known by the exercise of ordinary care of a defective condition of the highway, he cannot recover for resulting injuries.

When an automobile is operated at night it should be operated at a speed which would enable the driver to stop and avoid obstructions within the radius of his lights.

Guests.

The negligence of the operator of a motor vehicle is ordinarily not to be imputed to a guest riding as a passenger therein. If, however, a passenger tests with the driver a common danger, or sits supinely by in the face of imminent danger, such guest cannot recover on the ground of the negligence of the driver.

The Law of the Road.

The driver of every motor vehicle is required to observe what is known as "the law of the road," which in its final analysis is the custom of the country with regard to the passing of those who meet on the highway. In the United States, and generally in Continental Europe, automobiles or riders approaching each other on the highway are expected to keep to the right of the center of the graded part of the highway. In Great Britain the reverse is the rule. So long continued and universal is the custom for approaching vehicles to pass to the right, and to pass to the left, where the approach is made from behind, that it may be said to be a part of the common law of America. "The law of the road" is to be viewed as a known duty which every man travelling on the highways owes to society, and for the violation of which

the state exacts a penalty, and has provided a set of rules for general guidance, whereby travel on the public highway may be facilitated and made safe and convenient. "The law of the road" does not require a traveller to keep to the right side of the road at all times, but only to do so to avoid interference with other travellers. To drive in the middle of a road is not negligence of itself. The traffic congestion existing in our large centers of population present problems so varied that no state law can embrace every condition, and local regulations are generally upheld as being valid so long as they are not inconsistent with the express requirements of a state statute.

When two cars are travelling in the same direction, the front one has the superior right and may maintain its position in the center of the highway if there is sufficient space on its left for the rear car to pass safely. If there is no such room then the front car, on request or notice, must turn aside to make room for a safe passage. If at the moment the highway is not wide enough for the front car to turn aside, it is the duty of the rear car to wait until a place is reached where this may be done. Under such circumstances the passing vehicle should not unduly crowd the vehicle being passed.

Where two motor vehicles approach each other at the intersection of two highways at substantially the same time, the vehicle to the right is ordinarily accorded a superior right of way, although that is a matter usually regulated by local statute or ordinances.

Where one vehicle arrives at the intersection of two highways first, it has the right to proceed, and if such right is challenged by a vehicle approaching at right angle and a collision occurs, the latter is chargeable with negligence and must respond in damages.

It is a general rule of law that the driver of a motor vehicle approaching a railroad crossing must stop, look and listen immediately before crossing. Failure to do so would defeat any right of action for resulting death or injuries. The rule is not as strict as applied to street railways, the general rule of law being that the driver must look immediately before entering the tracks of a street railway.

Evidence of speed at a crossing is always cogent evidence of negligence, and will usually suffice to fix liability. It is a fundamental rule of law and common sense that motor vehicles must be driven slowly when approaching a crossing, and the test is whether the driver has control of the situation, whether he is so driving that he can stop, if necessary, soon enough to avoid an accident, and it is negligent to fail to slow down when necessary

in order to avoid a collision. Turning close at a corner at a high rate of speed, where the view is obstructed, is negligence.

There is considerable conflict in the decisions as to whether the laws requiring lights on motor vehicles operated at night apply when the vehicle is standing still, and this conflict may be explained only in part by differences in the wording of the various statutes, but the decided weight of authority is that lights are required on standing vehicles. A light should likewise be placed on any car that is being towed.

Drivers of motor vehicles must allow for the fact that their headlights will not illuminate the road around a curve and they must, therefore, use particular caution in making a turn from one road to another.

The weight of authority in this country is to the effect that the owner of a motor vehicle is not liable for permitting his minor son to operate his car for his own pleasure, the son not being regarded as an agent of the father, acting in the scope of his employment. In a number of states the courts have adopted the "Family Purpose Doctrine" to the effect that when a car owner gives it over to the use of his family, and permits it to be operated by the dependent members thereof, the individuals to whom it is so entrusted may properly be considered as agents in such a sense that their negligence in the use of the car is imputable to him, even though the driver of the car is an adult son of the owner.

The law governing every phase of motor vehicle ownership and operation is so complicated as to render a detailed discussion of it beyond the scope of our treatise on business law. In summary it may be said that in order to recover for either personal injuries or property damage sustained in connection with the operation of a motor vehicle, it is incumbent on a plaintiff to establish by the weight of believable evidence that the direct and proximate cause of the injuries of which he complains was the negligence or want of due care under the circumstances of the party from whom he seeks to recover. With the exception of those few states which recognize the doctrine of comparative negligence, the law is general to the effect that in order to recover he must show that he did not contribute to the happening of the accident, even to a small degree, by his own failure to exercise ordinary care.

In order for the owner of an automobile to be held liable for injuries resulting from the negligent operation of his machine by another, it must be established that the driver was engaged in his master's business, and that the negligent act was done within the scope of his employment.

In the sale, lease or resale of automobiles the statutes of the

particular state should be strictly observed, particularly as to those statutes regulating the equipment of a motor vehicle together with those defining the traffic rules governing their operation.

Circumstances, such as a heavy rain, a snow storm, a fog, a sudden cloud of steam or vapor, impose a higher degree of care on the part of the operator of a motor vehicle who encounters them. Likewise in driving through a street frequented by children, the law requires that a very high degree of care be exercised.

Notwithstanding that the instinct of self-preservation should impel every one attempting to operate a motor vehicle to exercise utmost care, not only for his own protection, but also for that of other motorists and pedestrians, the casualties resulting from automobile accidents are increasing. While the law fixes a civil liability for the negligent operation of a motor vehicle, the number of casualties will not be reduced to a minimum unless the driver who exceeds the speed limit, operates his car while under the influence of liquor, or is grossly negligent, is criminally punished and his license to operate a motor vehicle revoked.

DOMESTIC RELATIONS

Husband and Wife—Parent and Child—Guardian and Ward—Master and Servant.

THE law applicable to domestic relations, regulating the rights and duties of the household or family, constitutes one of the most interesting and important subjects included in the entire realm of jurisprudence, and will be considered under the following four divisions—Husband and wife, parent and child, guardian and ward, and master and servant.

In primitive times the wife was regarded as practically a slave, the captive or purchase of her husband, and mutual rights and duties were unknown. The rights were all with the strong (the man) and the duties belonged to the weak (the woman). The husband's control over the wife's person, as well as over the property she possessed, was regarded as law until comparatively recent times. According to the early Roman law, the husband could chastise, sell, or even kill his wife; he became the possessor of the wife's property and was entitled to her labor and earnings. The wife had the right to compel support and was entitled to a share of her husband's property upon his death.

Under the doctrine of the so-called "free marriage," which was developed at a later period, the husband and wife were regarded as partners, the husband having the right to choose the home, to regulate household expenses and the right of custody and education of the children. Under the English Common Law, husband and wife are regarded as one person, but in equity the wife's separate existence was early recognized and she was given the right to enjoy, control and dispose of her separate estate. The rights of married women at the present time are regulated by statute and almost universally throughout the United States a married woman has the same rights as a single woman with the exception that she cannot become surety, guarantor or accommodation indorser for another. So strong are the moral obligations which attend marriage, and the training of offspring, so intimately blended with the welfare and happiness of mankind are the ties of wife and child, that no one should grow up without some knowledge of the general principles of law applicable to these topics.

Earliest of Institutions.

The family was the earliest of all social institutions, preceding that of government itself. The propagation of offspring afforded the only means whereby society could hope to grow into a permanent and compact system. Families at first lived under the paternal government of the person who was their patriarch or chief. But the increase in families caused division, and when a common enemy threatened it became necessary to unite for mutual protection. Thus governments were developed, which merely represent a collection of families.

Marriage may be defined "as a relation divinely instituted for the mutual comfort, well-being and happiness of both man and woman, for the proper nurture and maintenance of offspring, and for the education in turn of the whole human race." Marriage necessarily affords a discipline to both sexes. Woman's condition becomes one of comparative subjection; man is tamed by her gentleness and the helplessness of tender offspring, and for their sake he puts a check upon his baser appetites and concentrates his affection upon the home he has founded, of which he naturally becomes the head. It is the law, growing out of the relationship incident to marriage, which we will proceed to briefly investigate.

Marriage supposes a home and mutual cohabitation. It is for the wife to love, honor and respect; it is for the husband to love, cherish and protect. The husband, as head of the family, has the right to fix the family name. By custom the wife takes the surname of the husband, but inasmuch as the husband may lawfully change his name, there is no legal objection to his adopting his wife's family name should he so desire. The court has power to change the name of a wife against the wishes of her husband, where her true interest will thereby be promoted; but a court will reject an application for such a change where the wife and husband are separated, and to grant such change would seem to close the door to reconciliation.

Duty of Cohabitation.

The most important duty which attaches upon both husband and wife is that of cohabitation. Cohabitation does not imply the daily and nightly residence under the same roof of a husband and wife; circumstances of life, such as business duties, domestic service, etc., may separate husband and wife, and yet there may be an existing state of cohabitation. The husband is given the right to choose the home or domicile; he may locate his home wherever he pleases, and, as a general rule of law, the wife must

follow her husband throughout the world. A husband cannot lawfully require his wife to reside in a place which would endanger her health or where she would be subjected to unreasonable hardship or distress. If the wife be a minor, her husband's right to her person is paramount to that of her parents or guardian. The right of custody enables the husband to recover his wife from any person who would draw her from him. Parents and near relations stand on a different footing than strangers in this regard, but when one executes or attempts to execute a malicious intent to alienate the affection of a wife from a husband the latter may sue for damages for alienation of affections.

A husband has no right under the law to inflict corporal punishment on his wife. It has been held that a husband cannot, for the purpose of compelling his wife to live with him, imprison her in his own home. If a husband is guilty of violence or cruelty the wife may have him arrested, upon which he will be compelled to furnish bail to keep the peace. Blackstone says that in case of any gross misbehavior the husband can restrain his wife of her liberty, but the better authority seems to be that laid down by Chancellor Kent, to the effect that the husband, in case of misconduct by his wife, may resort to "gentle restraint." Such restraint would be justified if the wife should attempt to wantonly destroy her husband's property, or where the wife has eloped with a libertine, etc.

It is the husband's privilege to supervise or regulate the household, and the law regards the wife as his representative or executive officer properly intrusted with domestic details. The husband may determine the number and character of visitors to his house, the style of entertainment and the arrangement of the rooms, etc., and the wife is legally bound to conform to her husband's tastes and habits, even to his eccentricities. Whims and caprices of the husband need not be obeyed if they endanger the wife's health, or render her life burdensome or her existence intolerable.

Right of Support.

Another essential duty which the law casts upon a husband is that of support and maintenance. This he is bound to do even though the wife has a separate estate of her own. This duty applies as much to a husband who is a minor as to an adult. Where a man lives with a woman and holds her forth to the public as his wife, he cannot deny it when charged with liabilities as her husband.

A husband is liable for groceries purchased by his wife and

necessary for the use of his family, in the absence of notice not to sell to her on his credit, and even after such notice if he has failed to supply her with means to purchase same. A husband is liable for his wife's contracts for necessaries. It has been held that where a wife in the presence of her husband enters into a contract for board, without any express promise to charge herself or her separate estate, the board contracted for being such as her husband is bound to furnish, he, after the board is furnished, is alone liable for the bill, although the other party may have intended to charge it to her. Where a wife obtains necessaries for the family of herself and husband the presumption is that she does so as his agent, and if she sends for a physician to attend herself or children she will not be held liable to pay for his services out of her own separate estate, unless she specially agrees to do so.

A husband is legally liable for the funeral expenses of his wife, even where in her will she directs same to be paid out of her separate estate. But if the husband is insolvent the estate of his deceased wife is liable for her medical and funeral expenses. It has been held that where a husband without justification deserts his wife and children, he is liable for necessaries ordered by and delivered to the wife for the use of herself and children, and this would be the case even though the wife had repudiated the husband's offer of allowance. It is unnecessary to further elaborate on the duty imposed by law on the husband. Suffice it to say that the support which the law requires a husband to give his wife and children is such as is reasonable, considering his situation and condition in life.

It should be borne in mind, however, that the duty of the husband to support his wife and family does not extend to the support of his wife's children by a former marriage. Strictly speaking, stepchildren form no part of his family. An antenuptial agreement to support stepchildren is not binding.

Services of a Wife.

As a corollary to the husband's duty to support his wife, the marital relation imposes the duty on the wife to render services to her husband, the extent of which it will be well to consider.

It is a legal presumption that a wife's services and the comfort of her society are fully equivalent to any obligations which the law imposes on her husband, because of the marital relation. Services performed by a wife for another for compensation are presumed to be done on the husband's behalf. Upon this theory

the law allows the husband a right of action for damages resulting from loss of his wife's services occasioned by accident due to the negligence of a third party. Although, as a general rule, a husband is entitled to receive all money paid for his wife's services, yet when those services are gratuitously rendered he has no right to compensation. If she is afterward rewarded by a voluntary gift, her husband can have no more claim to it than a stranger.

It is generally conceded that the wages of a married woman earned by her labor belong to her, and where a married woman attends upon a boarder, cleans his room and administers medicine to him when he is sick, she is entitled to recover compensation for her services in her own name, although the contract for boarding was made with her husband. Such services are not those of an ordinary house servant, and, therefore, the fact that she did not present a claim for her services for a considerable time after they were performed will not prevent a recovery. A suit for the value of the services of a married woman in the temporary employment of nursing is properly brought in the name of the husband alone; where, however, the employment is of a permanent character so as to become a trade or business she is entitled to recover in her own name. When a married woman leases and runs a boarding house, its profits belong to herself and not to her husband, and this is so even though he be permitted to live and be maintained upon the property and voluntarily bestows labor in running it.

It has been decided that the earnings and services of a wife in her husband's business do not belong to him, and property bought with such earnings are not subject to levy and sale by a husband's creditors.

Variations in the law regarding married women will be found in the Abstract of Married Women's Acts. We will confine the text to a discussion of general principles only.

Respective Property Interests.

At common law the personal property belonging to a woman at the time of her marriage or acquired afterward by gift, bequest or purchase, vested in the husband, but the wife acquired no rights whatever in the personal property of the husband. This rule, however, has been considerably relaxed by statute. A married woman is ordinarily given the same rights and powers as an unmarried person to "acquire, own, possess, control, use, lease, sell or otherwise dispose of any property of any kind, real, personal or mixed, and may exercise the said right and power in the same manner and to the same extent as an unmarried

person." But a married woman cannot mortgage or convey her real property unless her husband join in such mortgage or conveyance.

Where property is claimed by a married woman as against the creditors of her husband, she must show by evidence which does not admit of reasonable doubt either that she owned it at the time of her marriage or else acquired it afterward by gift, bequest or purchase. In case of a purchase after marriage the burden is on the wife to prove distinctly that she paid for it with funds which were not furnished by her husband, in the absence of which the presumption is most strong that the husband furnished the means of payment, which rule applies the same to real property as to personal property. It will always be presumed by law, in the absence of evidence to the contrary, that household goods, where husband and wife are living together, belong to the husband. A married woman's judgment note for the purchase of land is valid, but a married woman who has borrowed money from her father to purchase a farm and who has given a bond and mortgage to secure the debt, cannot, after her father's death, relieve herself from liability upon the bond by tendering to his executor a deed for the land. A wife cannot go bail for her husband or upon any recognizance for another. The right of a married woman to become surety for another is expressly prohibited by statute in most states.

A conveyance of real estate by the husband during coverture for the purpose of defeating the wife's rights is fraudulent and void as to her. So far as personal property is concerned, the husband can transfer whatever he desires. But a husband cannot transfer personal property to defeat a wife's right to alimony or maintenance, and any transfer of personalty made with obvious fraudulent intent upon the rights of the wife will be set aside. For example, where the transfer is a mere device by which the husband, not parting with the absolute dominion over the property during his life, seeks at his death to deprive his widow of her distributive share in his personal property, it would be held by the courts as a void transfer.

A conveyance or devise of lands to a husband and wife does not create a joint tenancy, but what is known as an estate in entirety, and is confined to the relation of husband and wife. A conveyance to husband and wife, if nothing else appears, vests in the grantees an estate in entirety, whether the consideration was furnished by both or entirely by one of them. Upon the death of either, his or her share passes, by the doctrine of survivorship, to the other. An annuity given to a husband and wife

belongs solely to the husband during their joint lives, and is liable for his debts. Where payable to himself and wife, it remains during his life subject to his control, and the wife has no legal interest therein until his death.

A bequest to a husband and wife of a sum of money in equal proportions does not create an estate by entireties, and hence the husband's share, on his death in the lifetime of the testatrix, lapses, and does not pass to the wife by survivorship. Likewise a bond and mortgage, taken in the name of a husband and wife, will not vest in them jointly, so that either will have the right of survivorship on the death of the other where they contribute equally in making up the loan out of their separate property, but on the death of either the interest of the decedent will vest in his personal representatives. In case husband and wife, each being possessed of means, have made investments jointly, each supplying half, and have taken the securities in their joint names, the wife, on the decease of the husband during her lifetime, does not take the whole by the right of survivorship. The rule which prevails as to the right of survivorship, in the case of united holdings of real estate by husband and wife, is not applicable to personalty. In case of an estate in entirety being created, neither husband nor wife, without the consent of the other, can dispose of any part of the estate so as to affect the right of survivorship in the other.

During marriage the husband has the entire use of the estate in entirety. His right to enjoy the use, rents and profits of the estate may be conveyed, leased, mortgaged or assigned by him, and the husband's interest may be reached by his creditors.

By statute a married woman may obtain the privilege of a *feme sole* trader, *i. e.*, to enjoy the right of engaging in business, contracting debts, etc., separate and distinct from her husband, and a woman decreed to be a *feme sole* trader may convey her real estate by deed in which her husband does not join. Such conveyance, however, does not divest the husband's estate as tenant by the curtesy. The statutes relating to *feme sole* traders do not enable a married woman to incur an obligation as surety, if not being shown to be necessary to the prosecution of her separate business or profession.

A husband is liable for the reasonable funeral expenses of his wife, whether or not she may have had property of her own.

Agency.

A married woman may become the agent of her husband either by express authority or by implication of law. A hus-

band may appoint his wife as his agent either orally or in writing, as by a power of attorney. The wife's implied agency for her husband may be inferred from his acts and conduct toward her. The law will imply that the wife is acting as her husband's agent when she is left in charge of his property during his absence. A wife, while acting within the scope of her express or implied agency, binds her husband by her acts. The courts in some jurisdictions have qualified this rule somewhat, holding that a husband is bound by the acts of his wife done in relation to his property during his absence, unless within a reasonable time he disavows her acts. A married woman, acting as her husband's agent, may sell, mortgage, hire or otherwise dispose of his real or personal property or may sign receipts for rent. Unless acting as her husband's agent, a married woman has no authority to make or rescind any contract in his name or to dispose of his property. She cannot lease his lands or give a license to enter upon the same, nor has she any implied authority to draw his money from a savings bank.

A wife, intrusted by her husband with the ordinary business of a tavern, cannot bind him by a contract to give board for less than the usual rate. Likewise, where a husband permitted his wife to carry on a business in his name, and to draw in his name checks and notes to be used in the course of business, she had no power to make him liable as surety for loans to third persons or on mere accommodation paper. A wife cannot bind her husband for goods purchased for her daughter by a former marriage, with directions to charge them to herself, and send them to her daughter residing away from home, and even a promise of the husband to pay therefor, without any new consideration, is not binding.

Conversely, a husband has no power to bind his wife without showing express appointment as her agent, or unless there are such acts as clearly establish by implication his agency.

As a general rule of law a husband and wife cannot enter into a valid contract, as in the eyes of the law they are regarded as one, but equity will in many instances recognize and enforce the same, if reasonable and not prejudicial to third persons. For many purposes courts of equity treat husband and wife as distinct persons, recognizing their ability to contract mutually. It has been held that a married woman who lends money to a partnership of which her husband is a member cannot recover it in equity, or in law, for she cannot contract with nor sue her husband. This matter is regulated in many states by statute.

Where husband and wife are prohibited from entering into a valid contract, they frequently do so indirectly by means of the intervention of a third person or trustee. In equity, independent of statute, a gift of personal property from a husband to his wife will be upheld, if fair and reasonable, provided the rights of creditors are not prejudiced thereby.

It has been held that a husband cannot be indicted for slandering his wife, but either husband or wife may be indicted for an assault and battery upon the other. As a general rule, a husband and wife cannot sue the other in tort, but either may have the other arrested for a crime.

Neither the wife's equitable nor statutory separate estate is liable for the debts of her husband.

It will be unnecessary to discuss the respective rights of a husband and wife in the estate of the other after death, as the subject of dower, curtesy and the descent of property has heretofore been treated.

Rights and Liabilities of Survivor.

Upon the death of the wife intestate the husband is entitled to obtain letters of administration on her estate. The wife's separate estate shall be liable for debts contracted upon the faith of it, but the husband is liable as administrator on the estate of his wife for her debts, only to the extent of the assets thus received by him. A husband on the death of his wife becomes tenant by the curtesy of his wife's real estate, which means that the husband has a freehold estate therein for the term of his natural life. Of course if the wife has made a will, the husband must elect whether to take under the provisions thereof or by virtue of his right as tenant by the curtesy.

When marriage is dissolved by the death of the husband, the widow is entitled to administer upon his estate. The common-law obligation of the widow to bury her deceased husband rests upon weaker foundations than the corresponding obligation of the husband. If the husband's estate is sufficient it ought to bear the expenses of his burial. As to the possession of the dead body of the husband for preservation and burial, the surviving wife is treated with the same paramount consideration as against strangers and even the next of kin which a surviving husband receives. A woman who has paid the expenses of her late husband's final illness and funeral from her separate property may charge the same against his estate. Upon the death of her husband, a widow is entitled to her dower in his estate. If he made a will she may elect to take thereunder, or she may take her

statutory or common-law dower, the nature of which estate we have heretofore considered. Where husband and wife die at the same time, or practically so, and personal property is found in one receptacle, to which both had access, and there is nothing to show how much each contributed to the fund, a court of law will consider it as owned by them in equal shares.

Parent and Child.

The most universal relation in nature according to Blackstone is that of parent and child. Natural law and the precepts of revealed religion demand the preservation of this relation in its full strength and purity. Children are a common object of affection to the parents and draw closer the ties of their mutual love; a child's education is a matter of the parents' common care, which further identifies their sympathies and objects.

The term "parent" signifies the immediate father or mother of a child, and a person is said to be *in loco parentis* when he or she is invested with the rights and charged with the duties of a parent. Children are divided into two classes, legitimate and illegitimate. A legitimate child is one born in lawful wedlock or is properly brought within the influence of a valid marriage by reason of the time of birth. In other words, a child to be legitimate must be born in a manner approved of by the law. If a child is begotten before marriage, but is born during lawful wedlock, it is legitimate, as would also be the case if begotten in lawful wedlock, but born afterward. A ceremonial marriage is not necessary. A common-law marriage may be established by cohabitation and reputation, and children born therein are legitimate. The law raises the strongest presumption of the legitimacy of all children and the burden of proving illegitimacy is upon them who assert it.

The citizenship, residence or domicile of a child is that of its parent, father, if living at time of birth; a child until it reaches its majority cannot change its domicile from that of its parents.

The relation of parent and child may be created in two ways—(1) naturally, and (2) by adoption. A natural child is a child born in lawful wedlock. Adoption is the taking or choosing of another's child as one's own. The method of adoption in the various states is pointed out by local law, which usually provides that under a judicial decree rendered upon due investigation, any person may adopt as his own the child of others, who shall be deemed, for the purpose of inheritance and all other legal consequences and incidents of the natural relation of parent and child, the child of the parents by adoption, the same as if born to them in lawful wedlock.

The law imposes three duties on parents toward their children—(*a*) their protection, (*b*) education and (*c*) maintenance.

So far as protection is concerned, Nature works so strongly as to need a check rather than a spur. The law holds that a parent may justify an assault and battery in defense of his children. The parent should protect a child from all evil and injury and may maintain and uphold his children in their lawsuits without being guilty of the legal crime of maintaining quarrels.

A parent is bound to educate and maintain an infant child; and if another person performs this natural duty for the parent with knowledge and consent, the parent would be liable to pay a reasonable sum to such person. Under the public school system the state relieves the parent of this duty. The duty of education imposed upon a parent does not extend to providing a child with a trade or profession. Over the religious discipline and instruction of children courts have no jurisdiction. However, law deals only with the civil rights and duties belonging to the relation of parent and child. In fact, a father has no authority to control or interfere with the rights or conscience of his minor child, who has arrived at the age of discretion. The same court has further decided that although a father cannot compel his child against the child's conviction of right to become a member of any particular religious denomination, he may lawfully restrain the child from violating the religious obligations which it has taken.

Maintenance is that support which one person gives to another for his living, and the obligation for maintenance on the part of a parent extends until the child is in a condition to provide for itself and merely includes necessary support. A father is under no legal obligation to support an adult widowed daughter or her infant offspring. The law does not compel a father to maintain his idle and lazy children in ease and indolence, but he may require them to work and is entitled to their wages until they reach their majority.

In view of the fact that parents are bound to the performance of certain duties toward their children, they are vested by law with certain authority over them. With the progress of refinement a parent's authority over the person of a child has been much relaxed, and obedience is enforced more by kindness than severity. A court of law is reluctant to interfere in matters of family discipline and will discountenance every species of cruelty which goes by the name of parental rule. The right of moderate chastisement is given every parent, such being for the benefit of

the child's education; but a parent must not exceed the bounds of moderation and inflict cruel and merciless punishment. For example, where a father put his child, a blind and helpless boy, in a cold and damp cellar without fire during several days in mid-winter, he was held subject to indictment and punishment for such cruel treatment. A parent who suffers his child to starve to death is guilty of murder. A child's tenderness of age and helplessness are elements in such cases, and when children grow up they are presumed to provide for their urgent wants.

The father, and on his death the mother, is generally entitled to the custody of infant children, inasmuch as they are their natural protectors for maintenance and education. It may be stated as a general rule that the father is entitled to the custody of his legitimate children, to the exclusion of their mother, though they be within the age of nurture. If the child be of an age to exercise choice, a court will leave him to elect where he will go; if not, he goes to the father, unless he had abused the right to the custody of his child, or there be an apprehension of cruelty or some exhibition of gross profligacy or want of ability to provide for his children. But if the parents live in a state of separation without being divorced, and without the fault of the wife, the courts may, on application of the mother, award the custody of the child to her.

A parent will not be allowed to divest himself of the custody of a child, it being placed upon him by law, not for his gratification, but on account of his duties. Contracts for the surrender of the care and custody of children are held to be against public policy and no bar to the parent in an attempt to regain such custody. It sometimes happens, however, that parents have abandoned their minor children, or by act and word have transferred their custody to another. In such cases, where the custodian is in every way a proper person to have the care, training and education of the infant, and the court is satisfied that its social, moral and educational interests will be best promoted by remaining in the custody of the person to whom it was transferred or received when abandoned, the new custody will be treated as lawful and exclusive. After the affections of both child and adopted parent become engaged and a state of things has arisen which cannot be altered without risking the happiness of the child, and the father wants to reclaim it, the better opinion is that he is not in a position to have the interference of the court in his favor. His parental rights must yield to the feelings, interests and rights of other parties acquired by his consent.

Right to Child's Services and Earnings.

Blackstone says that the father should have the benefit of his children's labor while they live with him and are maintained by him. This right, the same as that of custody, is based upon the parental duty of maintenance and furnishes compensation to the father for his own services rendered the child. This is certainly true of the father, and the better opinion gives the same right to the mother after the death of the father, especially where the child is supported by her. In certain cases this right of services extends to adult children. For instance, after attaining majority, the child may elect to remain with the father as his servant, and be supported by him, or may be incapable of emancipation by reason of imbecility, and if in such case he continues to live with the father, the latter will be liable for the child's support and entitled to receive his wages.

A parent can maintain an action for services against a corporation which knowingly hires and keeps in its employ a minor child of such parent against the latter's will. The question whether a minor over eighteen years of age may enlist in the military service of the United States without the consent of his parent or guardian seems to be unsettled. It has been held that where a man enticed away the minor son of another, against the father's consent, and placed him in the United States Army, that he was liable for the value of his son's services during the whole period of his absence as a soldier.

A parent has no title to the property of a child nor is the capacity of the latter to take property or receive money by grant, gift or otherwise, except as a compensation for services, in any degree qualified or limited during minority. Whatever, therefore, an infant acquires which does not come to him as a compensation for services rendered belongs absolutely to him, and his father cannot interpose any claim to it, either as against the child or as against third persons who claim title or possession from or under the infant. The law vests no authority in a parent to manage or control a child's property, unless formally appointed as guardian by a court of competent jurisdiction, and it is well to bear in mind that a court will seldom appoint a parent guardian of a child's property.

Gifts between parents and children are valid unless prejudicial to the creditors of the party making the gift. A father can settle property in trust upon his children the same as he may upon his wife. Gifts from a child to a parent, especially when made just after attaining majority or while still under the parental control and authority, are looked upon by the law with suspicion,

and the parent is required to show that they were the spontaneous acts of the child with a full understanding of his rights and position, or equity will set them aside. Gifts between parents and children are ordinarily supported upon the consideration of natural love and affection.

In transactions between members of the same family, even though that relation subsists between them from whence a court will infer the moral certainty of considerable influence and the probability of its having been exercised, yet if the transaction be one that tends to the peace or security of the family, to the avoiding of family disputes and litigation, or to the preservation of the family property, the principles by which such transactions must be tried are not those applicable to dealings between strangers, but such as on the most comprehensive experience have been found to be best for the interest of families.

Rights and Liabilities in Tort.

If a minor child is injured through the negligence or malfeasance of another, the parent cannot recover for the injury as such, this right belonging solely to the child, however the father may recover for the loss to himself caused by the injury, which will be measured by the loss of the child's services during minority, if a permanent injury; otherwise until recovery, and by the expenses of the illness caused by the injury. On the death of the father the mother succeeds to his rights. Any one, in fact, standing *in loco parentis* to the child may recover for an injury to the child on the same principles.

In regard to the liability of a parent for injuries done to third persons by a minor child, it may be stated as a general principle of law that a father is not liable for the torts of his minor children. This rule does not apply, however, to cases where the tort is committed by the child while engaged in performing work directed by the father; where a child is engaged in the father's service and in doing work authorized or commanded by him, he is responsible for loss resulting to others from the negligence of the child, and it has been held that where a father permits his young children to do upon his premises acts which are likely to cause injury to passers-by, he is responsible for the injuries so resulting, although he did not by express words authorize or direct the acts. But a parent cannot be held liable for the wilful trespasses and torts of his infant children when he neither assents to nor ratifies them. In other words, a parent incurs no responsibility for the acts of minor children if he can prove that he was unable to prevent the acts which give rise to the liability.

Rights and Duties of Children.

The duties which are enjoined upon children to the parents are obedience and assistance during their own minority and gratitude and reverence during the remainder of their lives. Disobedience to parents was punished under the Jewish law with death (Deut. xxii : 18), and with the Hindoos it was attended with the loss of the child's inheritance. The classical scholar cannot be at a loss to recollect how assiduously the ancient Greeks provided for the exercise of filial gratitude. Solon ordered all persons who refused to make due provisions for their parents to be punished with infamy, and the same penalty was incurred for personal violence toward them. No one can read "King Lear" without recognizing the sublimity of an unquestioning faith in this moral duty.

A child has no absolute right of inheritance from the parents. In most of the United States statutes have been passed providing for the maintenance of indigent parents by their children, but this obligation can only be enforced in the mode pointed out by statute.

Emancipation.

It is possible in law for a minor child to become freed from parental control by becoming what is called "emancipated." Emancipation means the release of a child from the obligations due a parent, and is not a right enforceable by the child, but a privilege given by the parent. So far as the general public is concerned, the emancipation of a minor by its parent does not give the minor the right to enter into valid contracts, but it gives the child the right to its own wages or earnings. Emancipation may be accomplished either by entering into a written agreement or it may be inferred from the conduct of the parent in permitting the child to use his time as though he were emancipated. If a parent deserts or abandons a child, the child is released from all filial duties which the law will enforce, and may seek his own welfare in his own way. The marriage of a minor child with the consent of a parent operates as an emancipation, giving the minor child the right to apply his earnings to the support of his own family.

Advancements.

A father sometimes gives to a child an advancement on its distributive share in his estate. Whether gifts made to a child during the lifetime of a father are to be regarded as an advancement is a question of intention. Small sums of money given

a child for current expenses, ornament or education are not to be regarded as advancements. Loans of considerable importance to a son, annuities and large sums advanced for a trade or profession are usually regarded as advancements, which, upon the death of the father and the distribution of his estate, are to be deducted from the share of the child who received the advancement.

The authorities are uniform to the effect that a person is not entitled to the custody and earnings of stepchildren nor bound by law to maintain them. However, if a stepfather voluntarily assumes the care and protection of a stepchild he stands *in loco parentis* for the time being.

In concluding the subject of parent and child we will inquire into the authority whereby children may be taken from their parents and committed to penal and charitable institutions. The law regulating this matter is entirely statutory. The principles involved in the construction of such statutes are founded on familiar principles of law and have enabled the courts to enlarge the scope of these institutions. Where the commitment of a minor is for a distinct criminal offense he is entitled to all the regular formalities of criminal procedure, and statutes authorizing the summary commitment of minor criminals without a trial by jury have been held unconstitutional. Where, however, the minor has committed no criminal offense, the state has authority to commit to a child-saving institution by summary procedure any child who, destitute of parental care, seems likely to grow up to be a charge upon the state, either as a criminal or as a pauper. In modern times, statutes have been enacted in a majority of our states creating special juvenile courts, which are invested with the power of committing delinquent minors to reformatories or other penal institutions without the formality of a trial by jury.

It is the object of the law to train and discipline children to become useful and law-abiding citizens, and to protect them from contaminating influences and the indiscretions incident to their tender years. As a further illustration of the watchful eye exercised by the law over minor children, statutes have been enacted which provide that any licensed keeper, proprietor, owner or superintendent of any public pool room, billiard room, bowling saloon or ten-pin alley, who shall allow or permit any person under the age of eighteen years to be present therein, shall be guilty of a misdemeanor, and upon conviction thereof be punished by fine of not less than ten dollars nor more than one hundred dollars.

Having concluded the subject of parent and child, it is appropriate that we consider next the relation of guardian and

ward, particularly in view of the fact that the latter is so closely allied to the former.

Guardian and Ward.

A guardian has been defined as one who legally has the care and management of a person or the estate or both of a child during minority. A ward is one whose person or property, or both, are under the care of a guardian. The relation of guardian and ward may exist during the lives of the parents, if the infant becomes vested with property, but it usually takes place on the death of the father, and the guardian is intended to supply his place. But to give the clearest conception of the status of a guardian, the following definition is perhaps the most complete: "A guardian is a person lawfully invested with the power and charged with the duty of taking care of the person and managing the property and rights of another person, who, for some peculiarity, or defect of age, understanding or self-control, is considered incapable of administering his own affairs." From this definition it will be observed that guardianship applies to idiots, lunatics, spendthrifts and the like, the same as to minor children.

According to the classification given by Chancellor Kent in his American Commentaries, there are two kinds of guardianship —one by the common law and the other by statute. There were three kinds of guardian by common law—(*a*) guardian by nature, (*b*) guardian by nurture and (*c*) guardian by socage.

Guardianship by nature at common law, according to the early English authorities, was the right of the father, mother, next of kin, in the order named, to the custody of the person of the heir apparent. In America, at the present day, the term "guardian by nature" is applied to all the incidents of the common-law guardianship by nature, with the exception that it is not confined to the heir apparent, and the authorities in this country hold that a father, and on his decease the mother, is guardian by nature of the child. After their death the paternal grandfather or next of kin is the infant's guardian by nature. This species of guardianship extends only to the custody of the person of the ward and not to his property, either personal or real. Guardianship by nurture never existed in the United States; in England it was the right only of the father or mother to the custody of the person of an infant, not the heir apparent, who was without any other guardian. It ended when the ward reached the age of fourteen, and extended only to the care of the person and education of the infant, no right to the control of the property of the ward vesting in a guardian of this class.

Guardianship in Socage.

Guardianship in socage at common law arose whenever an infant under fourteen years of age acquired title to real estate, the chief object of this trust, according to Blackstone, being the protection of such property and the instruction of the young heir in the pursuit of agriculture. Those who followed the treatise on feudal tenures, under the subject of real estate, appearing in another chapter, will better understand this species of guardianship. It applies only when the infant inherits land and cannot exist if his estate be merely personal. It was necessary that the heir's title must have been legal, not equitable. These guardians in socage cease when the child arrives at the age of fourteen years, for he is then entitled to elect his own guardian and compel an accounting of the rents and profits received until that time. Guardianship by socage only exists today in a limited degree as to certain features.

The second, and by far more important, division of guardians is statutory. At common law a father has no right to appoint a testamentary guardian for his child. This right was given by the Statute of 12 Chas. II, c. 24, by the terms of which the father by his last will and testament or by deed might appoint a guardian for his infant child until he was of full age. This statute has been adopted, or substantially so, in practically every state of the Union.

A testamentary guardian cannot transfer the custody of the ward by deed or will to any other person, the trust being personal. The infant ward cannot compel an accounting until majority is reached. This kind of guardianship covers the person as well as estate. If the ward be a girl her marriage terminates a testamentary guardianship.

A guardianship devised to more than one, passes to the survivor or survivors on the death of one of them. The appointment of a testamentary guardian may be made by deed. The powers and functions of a testamentary guardian supersedes the claim of any other guardian and extends to the person and all real and personal estate of the child and continues until it arrives at full age. In most states of the Union 'statutes give an infant, on reaching the age of fourteen, the right to select his own guardian, but the right does not exist unless expressly given by statute. The father of an illegitimate child has no power to appoint its guardian, nor may a grandfather appoint by will a guardian for the grandchild, child of his son or daughter, unless such son or daughter, if living,

receives and accepts a benefit from the will. The right of custody bestowed by the father's will will prevail against that of the child's own mother; although a testamentary guardian does not owe his appointment to a court, he is subject to removal for cause by it.

Owing to a popular misapprehension upon the matter, it is well to bear in mind that a testamentary guardian cannot be superseded by the selection of the child on its reaching the age of fourteen. Upon cause shown the orphans' court may require a testamentary guardian to give security for the ward's protection.

The last class of guardians are guardians *ad litem*, being a guardian chosen to represent the ward in legal proceedings. He has no power to bind the infant by anything further than the ordinary proceedings of the suit.

Our courts of law are vested with authority by statute to appoint guardians for the protection of persons legally incompetent to control themselves or their property. Two important elements enter into the jurisdiction of the court to appoint a guardian. The ward must be a resident within the jurisdiction of the court, and the property possessed by him must be located therein. Sometimes where the ward is a non-resident a guardian is frequently appointed for the collection and preservation of the ward's estate located within the jurisdiction.

Where the husband is an infant the wife's estate devolves upon the guardian of her husband and the appointment of a guardian for the wife is a nullity. Of course, a guardian cannot be appointed for a minor whose natural protector is living, as, for instance, the adult husband of an infant wife. It has been held that a guardian may be appointed for an infant whose parents have abandoned him, or for an infant who by statutory proceedings has been taken from its parents and placed in the custody of a person selected by the court.

Persons of the same religious persuasion as the parents of the minors shall in all cases be preferred by the court in their appointment, and such appointment or admission of a guardian by the orphans' court of the county in which the minor resides shall have the like effect in every other county as in that by the orphans' court of which he shall have been so admitted or appointed.

Who may be Appointed Guardians.

It is a well-settled rule of law that in the appointment of a guardian the interest of the minor is the paramount consideration. A court will take into consideration not merely temporary

welfare, but the state of the minor's affections, attachments, his training, education and morals. The guardian's trust is one of obligation and duty, and not of speculation and profit. He cannot reap any benefit in any contract or purchase, or sale, as to the subject of the trust. If he settle a debt upon beneficial terms, or purchase it at a discount, the advantage is to accrue entirely to the infant's benefit. Consequently an important qualification of a guardian is personal disinterestedness and absolute freedom from social or financial obligations antagonistic to the financial interests of his ward. Such opposing influences have a tendency to divide and weaken the strict loyalty which the law demands of a guardian towards his ward.

A partnership cannot be appointed a guardian, nor can a corporation unless specially authorized to do so by its charter.

When vacancies occur in a guardianship, by the death of the guardian, a second may, and properly should be appointed if the minority still continues. If a guardian resign, or his appointment be revoked, the orphans' court may appoint a successor. Where the duration of the guardianship has expired, the guardian must render a strict accounting of his trust, the guardianship terminating on the arrival of the ward at majority, except for the purpose of a final accounting and settlement with the ward. As a matter of fact, while the guardian's trust expires on the ward's reaching majority, the responsibility of his relation may continue, as, for instance, where he has not made his final account with the ward, or where the guardian incurs a personal responsibility on a contract made by his ward in pursuance of an express authority.

The orphans' court has power to remove any guardian for mismanagement of the estate, or misconduct as to the care of the person of the ward. Where the management of the trust property has been adverse to the interests of the minor, and a feeling of hostility has been engendered, which may prove embarrassing and injurious to all parties a petition for the removal of the guardian will be granted.

Particular Rights and Duties of Guardians.

Having considered briefly the nature of guardianship, how created and terminated, it will be instructive to point out a few of the particular rights and duties appertaining to this relationship. Every general guardian, whether testamentary or appointed, is bound to keep safely the real and personal estate and the issues and profits of the real estate, and if he suffers any waste, sale or destruction of the inheritance he is liable to be removed

and to answer in treble damages. If the guardian has been guilty of negligence in the keeping or disposition of the infant's money, whereby the estate has incurred loss, the guardian will be obliged to sustain that loss.

If the guardianship cover the person of the ward it is the duty of the guardian to protect, educate and maintain the ward. The guardian has not the same right as a father to the personal services of the infant, the guardian's duty to educate and maintain being limited by law to the ward's resources, and is not like the responsibility of a parent absolute. The guardian in considering what are necessaries for the ward is not to consider the style of life to which the ward was accustomed, but rather the income of the ward's estate at the guardian's disposal.

A guardian has no right to convert the personal estate of an infant into real estate, or buy land with the ward's money without applying to the court for authority. The power resides in the court to change the property of infants from real into personal and from personal into real whenever it appears to be manifestly for the infant's benefit.

It is a duty of a guardian to invest such funds as are under his control, and if same be more than sufficient for the purposes of the trust, upon application to court the right may be granted to invest such funds in the stocks or public debts of the United States or in the public debt of any state, or in ground rents, other real estate and real securities. A guardian cannot invest a ward's money in the stocks and bonds of any private corporation without rendering himself liable to be surcharged for any loss occurring. A guardian is entitled to expenses and compensation covering his services.

Master and Servant.

The last relation in domestic life which remains to be examined is that of Master and Servant, the law regulating which has been developed from the time when the vast majority of human beings were slaves.

Definition.

The term "master," in its legal significance, means one who has the superior choice, control and direction of the servant, and whose will the servant represents not merely in the ultimate result of the work, but in the details. In other words, a master is one who exercises personal authority over another, and that other is his servant.

A servant, strictly speaking, is a person who by contract or

operation of law is for a limited period subject to the authority or control of another person in a particular trade, business or occupation. In law it embraces all persons of whatever rank or position who are in the employ and subject to the direction or control of another in any department of labor or business. As a matter of fact the term "servant" may be used as synonymous with employee.

At common law servants were divided into three classes: Menial servants, apprentices and agricultural laborers and agents. All persons who were engaged in the master's family in general household duties, or who performed menial services under the immediate supervision or control of the master, connected with his household and lodging therein or living within the curtilage, were regarded as menial servants, and as such, although hired for a year, might be dismissed at any time upon a month's notice or payment of a month's wages. A governess engaged at a yearly salary, although performing her duties in the master's household, did not come within the rule relating to menial servants. Apprentices are those servants who are under special contract to learn a trade, during which they are under the control and supervision of a master. A third species of servants are laborers who are only hired by the day or week and do not live as part of the family. There is yet a fourth species of servants, if they may be so called, being rather in a superior capacity, such as stewards, factors and bailiffs, whom, however, the law considers as servants *pro tem.* with regard to such of their acts as affect their master's or employer's property. In a majority of the states of the Union, the distinction between the various classes of servants is of little importance, and all who are in the employ of another, in whatever capacity, are regarded in law as servants, whatever may be the social distinction. Thus it has been held that a detective employed by a railroad company is its servant, and likewise a civil engineer employed by a railroad company at a fixed salary and subject in his duties to the company's orders, is a servant of the company within a statute declaring stockholders liable for debts to laborers and servants.

Where in a will property is left to the testator's servants, it is well settled that the word "servants" includes only those that are employed in and immediately around the homestead of the devisor. It has been held that the term "servants" whose wages were by a legislative act to be paid out of an intestate's estate in the same rank with funeral expenses, embraced those only who in common parlance were domestics, persons who made part of a man's family, and whose business it is to assist

in the economy of the family or in matters connected with it, and that it did not comprehend workmen, employed at iron works and the like.

The law makes a separate classification of public servants, or those whose functions appertain to the administration of government, but which having no bearing on domestic relations, we will dismiss from our consideration for the present.

Formation of Relation.

The relation of master and servant arises out of a contract between the master on the one hand and the servant on the other. Therefore, to create the relation both parties must be capable of contracting and neither be under any legal disability which prevents mutuality. An agreed understanding is not essential to create the relation, it may be implied from circumstances; as where the master induces the belief that a certain person is his servant and thereby leads another to act upon such belief to his injury. The relation exists where one person is willing to work for another from day to day and that other desires the labor and makes his business arrangements accordingly.

A contract for services made with a minor is not invalid simply because it is not entered into with the parent or guardian; it is only voidable at the election of the parent or guardian. Employment of a minor without the parent's consent will in the absence of other evidence be presumed to be against the parent's will; but some courts have refused to recognize this presumption. As a general principle one may be said to hire and pay a minor at his peril. If he fails to ascertain the status of the child he must take what consequences may arise. But where a minor absconds from his father's house, and enters the service of one, who, for his labor, furnishes the infant a reasonable support, the father can only recover in an action against the employer the value of the services rendered less the worth of the necessaries supplied.

A contract of employment, whether written or verbal, may contain such terms and conditions as the parties see fit to make, provided they are not illegal and do not contravene public policy. Upon the consummation of the contract the one is bound to render the service and the other to pay the stipulated consideration.

Where there is no express contract between an employer and an employee, imposing on the latter a higher degree of skill, care, diligence and attention to the discharge of the duties of the position he contracts to fill, only the ordinary and reasonable skill, care, diligence and attention implied by law can be required

of him. But if the employee contracts for a higher degree of skill than the law implies, he cannot excuse himself from a failure to live up to his contract, by merely showing that he performed the duties of his position with the ordinary and reasonable degree of skill and care required of him by law.

A servant is presumed to have been hired for such a length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year; a hiring at a daily rate for one day; a hiring by piecework for no specified time. If a written contract of employment is entered into, little difficulty arises, but the vast majority of contracts establishing the relation of master and servant are merely oral, and hence in determining the rights of the parties we are compelled to rely on certain customs or usages and legal presumption. Where one was under monthly employment, and told his employer that he wished it more permanent, and an amount per year was agreed upon, payable semi-annually, a hiring for a year may be inferred. A hiring for personal services, for which payment is made quarterly, is not necessarily a hiring by the quarter or terminable by a quarter's notice.

If a servant is hired for a definite time and leaves the service before the end of it, without reasonable cause, or is dismissed for such misconduct as justifies it, he loses his right to wages for the balance of the term. A servant so hired may be dismissed by the master before the expiration of the term either for immoral conduct, wilful disobedience or habitual neglect. If the master wrongfully discharges his servant, he is liable to an action for damages and the servant may recover for loss of wages caused thereby during such time as he was compelled to remain idle. If a party contracts to render his services for a specified time and before the expiration thereof leaves, no action will lie against his employer unless such absence is caused through sickness or inevitable accident or by his employer.

A general or indefinite hiring is presumed to be a hiring at will. Employment by the year or at a yearly salary is not changed to a quarterly, monthly or weekly hiring by the fact that the payments are to be made quarterly, monthly or weekly. The courts of New Jersey have held that the reservation of wages payable monthly or weekly will not control the contract so as to destroy its entirety when the parties have expressly agreed for a specified term, as for a year. But if the payment of monthly or weekly wages is the only circumstance from which a duration of the contract is to be inferred, it will be taken to be hiring for a month or for a week.

If after the expiration of a contract of employment the service be continued, it will be presumed that the same is done upon the same terms and conditions as contained in the original contract.

If a master unjustly discharges a servant, or, having agreed to employ him, repudiates the contract before the commencement of the services, it is the duty of the servant to use reasonable care and diligence in entering into other employment of the same kind and thus reduce the damages. It has been held that whatever would be a good reason for discharging a servant would be an equally good reason for refusing to take him into the employer's service after having engaged to do so. It is, however, no defense to a contract to employ that at a time subsequent to the alleged contract the master had employees enough to do all his business.

Implied Contracts of Hiring.

In default of a contract of hiring a person may recover compensation for services where the same were rendered under such circumstances as to show that he looks to be paid as a matter of right, and such that the person for whom they were rendered was bound to know that he claimed compensation therefor or was legally entitled thereto. It is well settled that if one man labors for another, or renders him service in his business, and that other, knowing all the facts, stands by and sees what is done, and makes no objection, he is estopped to deny that such services were rendered at his request. Where one requests another to perform services for him, and no provision is made for compensation, the law implies a promise to pay what they are reasonably worth. The law does not imply a contract to pay for services between members of a family, unless such was the expectation of the parties concerned. The family relation necessary to rebut the presumption of a contract may exist between grandparents and grandchildren, also between a father or mother-in-law and son-in-law, or uncle and niece by marriage. A stepfather who receives his stepchildren into his family stands *in loco parentis* to them, and in default of an agreement no presumption will arise that he is under obligations to pay them for services rendered by them. The relationship of brother and sister does not overcome the legal presumption that a promise to pay is intended when personal services are rendered. Neither can a guest ordinarily recover for services rendered while in the home of another. Where a woman of twenty-five years of age lives for six years with her stepmother, from whom her father had been

divorced, working as a dressmaker, and was in the habit of giving some of her earnings to her stepmother and doing some of the household work, the court refused to allow her to recover wages from her stepmother for services rendered.

Where by contract one is employed by another to do work by the day or month or year, and nothing is said as to the time of payment for the services to be rendered, his wages are due and may be demanded at the close of each day, month or year, as the case may be. If a merchant employs a clerk, and, pending his term of service, the merchant forms a partnership in the same character of business, and the clerk enters the service of the firm, the contract with the original employer as an individual is at an end. Contracts of employment by the firm have been held to be conditional on the firm not being dissolved by death, and in case of the death of a partner the survivor is not obliged to carry out the contract. But the fact that employers who have agreed to hire an employee for a year and pay him a certain salary become insolvent and are obliged to cease business, and notify the employee that his services will not be required thereafter, does not absolve them from their obligation to pay according to the terms of the agreement.

In case a master notifies his servant that he will thereafter pay him less, and the servant continues work without notifying his master that he will claim more, a new arrangement is made which becomes binding on both.

Statutory Regulations.

The state may, in the exercise of its police powers, impose such regulations and restrictions upon the relation of master and servant as are conducive to the public welfare, health, safety or morals. For example, statutes have been passed prohibiting the coercing of an employee by a threat to discharge him because of his connection with a labor organization. Statutes establishing an eight-hour labor day for certain industries have also been held constitutional.

Termination of Contract.

The authorities are somewhat conflicting as to the rule to be applied when the contract provides for the satisfactory performance of the employee's duties. Some of the cases hold that the employer is the sole judge of what is satisfactory or not. Where a contract of employment provides for its termination upon giving a stipulated notice, such condition must be complied with, and a discharge or abandonment without the required

notice is unlawful. A contract of employment may be terminated by agreement of the parties or by their consent, either express or implied.

A rule requiring two weeks' notice of intention to quit services on pain of forfeiture of wages due has been held to be reasonable, and, if assented to by the employee, becomes part of the contract of employment.

Unless the contract of employment is terminated at will, an employer can arbitrarily discharge his employee, but only for good cause. Any act of a servant which injures or has a tendency to injure his master's business or reputation will justify his dismissal. That his services are no longer needed will not justify the discharge of a servant, nor can a master discharge for trivial reasons. A discharge for refusal to work on Sunday is unjustifiable and gives the employee a right of action. Absence from place of employment without leave, even for a day, has been held to justify a discharge. Inaccuracies and discrepancies in the books of a merchant are sufficient cause for the discharge of a bookkeeper. A servant is bound to use due care, and habitual negligence in the discharge of his duties or any neglect which may or does affect his master injuriously will warrant his dismissal. Insubordination, intoxication or intemperance have been held sufficient to warrant a discharge of a servant. Absence on account of illness is no excuse on the part of an employee, and an employer may discharge on this ground.

A master may set off against wages due a servant damages occasioned by the servant's negligence. When a servant whose wages are due and payable periodically refuses to serve in the manner contracted for, or is rightly discharged at any intervening period between the days when his wages are due, he can recover nothing for that portion of time during which he has served since the last periodical payment.

There is no obligation imposed by law on a master to give a testimonial of character, or letter of recommendation, upon the termination of a contract of employment. Where there is a custom among railroad companies to keep a record of the causes for which employees have been discharged, and for one company not to employ persons discharged by another for certain causes, a company is liable to a discharged employee for making a false entry on its records as to the cause of his discharge, which has prevented him from obtaining employment.

Upon his discharge a servant must leave peaceably, regardless of whether the discharge was rightful. If the servant fails to leave peaceably, or after doing so returns, he becomes a tres-

passer, and may be ejected by his master, even though his wages have not been paid in full.

Having considered how the relation of master and servant may be created and terminated, we will next discuss the important legal consequences which result from his association.

Rights and Liabilities.

The master is bound by the act of his servant, either in respect to contracts or injuries, when the act is done by authority of the master. If the servant does an injury fraudulently, while in the immediate employment of the master, the master as well as the servant has been held liable in damages, and the master is also said to be liable if the injury proceeds from the negligence or want of skill in the servant, for it is the duty of the master to employ servants who are honest, skilful and careful. Where one man employs another to do his work for him, the employer becomes responsible for the negligence or failure of the employee to exercise ordinary care in the performance of the work on behalf of his employer.

In order to establish the liability of an employer for an injury caused by the carelessness or negligence of a servant, it is not enough to show that the latter was at the time acting under an employment by the former; it must be shown in addition that the employment created the relation of master and servant. A contractor for a job by accepting and paying for work done thereon by a mechanic without his prior order or authority does not render himself liable for injuries caused to a third person by a negligent act committed by the mechanic while doing the work, not a part or result of the work itself, such as carelessly letting fall a brick.

The relation of master and servant exists where the employer selects the workman and may remove or discharge him for misconduct, and may order not only what work shall be done, but the mode and manner of performance. The power to control the alleged servant is the test of the existence of the relationship and the basis of the employer's liability for injuries to third parties. It has been held that where the person employed is in the exercise of an independent and distinct employment, and not under the immediate control, direction or supervision of the employer, the latter is not responsible for the acts of the former, and for this reason an independent contractor, as this term is understood in law, is not a servant so as to make a master liable for his acts. Railway postal clerks are not the servants of the railway company, nor is an inmate of a hospital the servant of

the superintendent thereof. It is interesting to note that the law does not hold a master liable where the negligence is that of a substitute engaged by a servant without any authority to delegate his master's power as to the particular work in charge of the servant.

The law is well settled that corporations are liable for the acts of their servants while engaged in the business of their employment to the same extent and in the same manner that individuals are liable under similar circumstances.

Special Employment.

Suppose a livery-stable keeper furnished a driver and team to a customer for a specified time or for a particular purpose. If the driver is placed under the exclusive control of the hirer, the latter is liable in case of accident, and not the master of the driver (the livery-stable keeper). From this illustration we may lay down the following rule, viz., A person who avails himself of the use, temporarily, of the services of a servant regularly employed by another person, is liable as master for the act of such servant during the temporary service. In such cases the test of liability is whether in the particular service the servant is engaged to perform he continues under the control of his regular master or becomes subject to that of the person to whom he is hired. Thus, where a company selling fireworks furnished employees to fire them off, but such employees are under the control of the purchasers, the company is not liable for an injury to a bystander caused by the negligence of such employee. If, on the other hand, the purchaser did nothing in connection with fireworks more than to locate the stand where the display took place, the servants being sent by the seller directing the display and the seller paying their expenses, such servants in discharging the fireworks are the servants of the seller, who becomes liable for their negligence.

Limitation on Master's Liability.

A master is, of course, only liable for the acts of his servants, provided such acts are within the legitimate scope of the servant's employment. A master is not liable for a servant's acts which are not within the scope of his employment, although such acts be intended to promote the master's interests. The test of liability is not limited to the character of the act, nor whether it was done during the existence of the servant's employment, but whether the injury complained of was committed by the authority of the master expressly conferred or fairly implied in the nature of the employment and the duties incident to it.

This limitation of a master's liability to acts within the line of the servant's duties has certain important exceptions. In the first place, railroad companies have been held responsible for assaults committed by their servants upon passengers, upon the ground that they undertook an additional duty involving the utmost care and good faith, the master's extra liability being based on the ground of public policy, it being more reasonable that the master who has placed his servant in a position of trust than the irresponsible stranger should suffer. Upon the same grounds it has been held that a shopkeeper is liable for the acts of his servants toward a customer in the store, even where such acts are not committed within the strict line of employment.

Where an injury occurs to a third person through the improper execution by a servant of a lawful act, the master alone is liable therefor.

It was formerly the law that a master was not liable for the wilful and malicious acts of a servant, as distinguished from negligent acts, but the law is perfectly settled today to the effect that the master is liable for the wilful and malicious acts of his servants where they are done in the course of his employment and within its scope. However, if a servant does a malicious act while engaged in his master's work, but outside of his employment, to gratify some personal animosity, the master is not liable. The owner of a race horse is liable to the owner of a competing horse where his rider fouls or intentionally runs against him.

A master, as a general rule, is not liable for the criminal acts of a servant, not authorized or sanctioned by him, such as larceny, counterfeiting, etc. The courts have held that where a watchman is employed to protect a building from burglars and himself enters and commits larceny therein, the employer of the watchman is liable to the owner of the building, although the act was outside the scope of the servant's employment.

If a servant step aside from his master's business for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended, and an act of the servant during such interval is his own. Thus, it has been held that where proper care has been observed in selecting honest and faithful officers, a bank is not responsible for a loss resulting from carelessness not in the course of the officer's business.

Where a person or corporation is compelled by law to employ an individual in a given matter, no liability will attach for the negligent act of such servant. For example, if a municipal corporation is obliged to let a contract to the lowest bidder, it would not be liable for the negligent acts of such.

The broad rule that a master is liable for all the acts of his servant within the scope of his employment, is equally as applicable in the case of contract obligations as in the case of torts, *i. e.*, negligence, etc. But the power of a servant to bind the master on a contract is included more properly in the subject of agency, which has already been discussed.

The terms "course of employment" and "scope of the authority" are not susceptible of accurate definition. An act is within the scope of the servant's employment where necessary to accomplish the purpose of his employment and intended for that purpose, although in excess of the powers actually conferred on the servant by the master. The purpose of the act rather than its method of performance is the test of the scope of employment. Where a servant employed to deliver milk to a factory mixed it with filthy water to gratify his malice toward his employer, and then delivered the milk, it was held that the tort was committed within the scope of his employment.

It may appear contradictory to state that a particular act of a servant may be within the scope of his employment, although it violates the express instructions or orders of the master, but such is nevertheless the case. For instance, where a master instructed his servant to go to a certain place and kill a beef, and the servant went and finding no animal there but a bull belonging to another killed and dressed that, the master was held liable.

A master is ordinarily liable for the trespasses of his servants, but not if the trespass be criminal and felonious. It is a well-settled principle of law that where a wilful injury is done by an agent, by the command or authority of the principal, both are, in law, principal trespassers, and therefore jointly liable. In other words, both the master who commands the doing and the servant who commits an act of trespass may be made responsible as principals, and may be sued jointly or severally. Again, the wrongful acts of a servant may render him personally and alone liable to a third person.

No action can be maintained against a servant unless he can be considered a wrongdoer, and where the servant obeys the commands of his master without negligence on his part, he is not liable for injuries to third persons unless he knew or had reason to believe that the act or acts were hazardous and liable to occasion injury to some third person.

The weight of authority holds that a servant is liable to his master for damages which the master has been compelled to pay to third persons because of the negligent or other wrongful

act of the servant, where the master is not himself in fault. He is also liable for the amount voluntarily paid by the master to the third person because of the acts of the servant, provided it is not in excess of the sum for which the master was legally liable.

Duties of Master Toward Servant.

When a servant enters into the employ of another he assumes all the risks ordinarily incident to the business. He is presumed to have contracted with reference to all the hazards and risks ordinarily incident to the employment. Consequently he cannot recover for injuries resulting to him therefrom except in states where Workingmen's Compensation laws are in force. In performing the duties of his position, the servant is bound to take notice of the ordinary operation of familiar natural laws and to govern himself accordingly. If he fails to do so the risk is his own. He is bound to use his eyes to see that which is open and apparent to any person using his eyes, and if he fails to do so he cannot charge the consequences upon the master. A servant does not, however, assume the risk of any dangers arising from unsafe or defective methods, surroundings, machinery, or other instrumentalities unless he has or may be presumed to have knowledge or notice thereof.

The rule of law regulating the obligation between master and servant is that the former is liable for all accidents occurring in the course of the employment, which are not induced by the carelessness or improper conduct of the employee. In other words, the master is bound to use reasonable care and diligence to prevent accident or injury, and if he does not he will be responsible for the damages, unless the servant assumed the risk or contributed to the injury through his own negligence. The master is only required to exercise such ordinary and reasonable care and protection for the safety of his servants as the nature and dangers of the business demand.

Persons employing minors must anticipate the ordinary behavior of children, must take notice of their lack of judgment, and must exercise greater care toward them than is required by law to be exercised toward adults. That is to say, where a minor is employed in a business, the danger of which he is unable by reason of his immature judgment to comprehend, and is injured, the master is liable. That a minor answers falsely as to his age, and secures employment by so doing, in violation of a known rule against employing minors, does not make him a trespasser or deprive him of his right to protection as an employee, when actually engaged in his employer's service.

A contract between master and servant before the happening of an injury, whereby the servant, in consideration of the employment, agrees to release and discharge his master from liability on account of injuries caused by the negligence of his master or the latter's servants, is void as against public policy. If, however, an employee agrees, upon becoming a member of his employer's relief association, that the acceptance of relief therefrom on being injured shall bar his right of action against his employer for the injury, such contract is not void as against public policy. The acceptance of benefits under such a contract bars an action for damages on account of the injury.

The master must furnish the servant with a safe place within which to work, safe tools and appliances with which to work, must give instructions regarding work, the danger of which is not apparent, and must employ competent fellow-workmen or servants.

A servant not only assumes the risks that existed at the beginning of his employment, but also those arising in the course of his employment. It is sufficient if the master furnishes his servant with reasonably safe and suitable appliances and places in which to work, the law not requiring him to furnish the most expensive, newest and best machinery. The master's liability is met when he furnishes such as are reasonably safe and suitable for the purpose.

If a servant of full age and ordinary intelligence upon being required by his master to perform other duties more dangerous and complicated than those embraced in his original hiring, undertakes the same knowing their dangerous character, although unwillingly and from fear of losing his employment, and is injured, he cannot maintain an action against the master for the injury.

The measure of the master's duty is reasonable care, and this necessarily has relation to the parties, the business in which they are engaged, and varies according to the exigencies which require vigilance and attention, conforming in amount and degree to the circumstances under which it is to be exerted. It is not necessary in order to entitle a servant to recover for injuries received from defective machinery, that he should show that the master had actual knowledge of such defects. It is enough if he shows that he ought to have known of them, and might have known by the exercise of reasonable care on his part in examining and inspecting the appliances.

The measure of care imposed on the master for the safety of his servant in the use of dynamite or other explosives is that ordinary care which reasonable and prudent men would exercise

under like circumstances, and where a master furnishes an explosive known to him to be dangerous and unsafe for the use to which it is to be put, or which has never been used for the purpose, and is in fact unfit and unsafe therefor, he is guilty of negligence. Likewise, where a servant is injured by an explosion which is the necessary result of improper appliances the master is liable.

Where the master knows or should know that an animal used by him is vicious, or that his harness is not reasonably safe, he is liable for injuries to his servant as a result thereof.

We have already called attention to the fact that a master is required to provide his servant with a safe place in which to work. It should be borne in mind, however, that this rule does not apply to a case where servants are creating a place of work which is constantly changing in character by their labor, when it only becomes dangerous by the carelessness or negligence of the workmen when the dangers which arise are only short lived, or when, by the negligence of the workmen, the place is rendered unsafe without the master's fault or knowledge.

Where the work is the construction of a new building the master is not under the same duty as he would be if the building were complete and fitted for use, and he cannot be held to the same degree of care with respect to temporary floors, or other structures, mainly constructed by the workmen for their own use, for purposes which are constantly changing as the work progresses and which uses in the nature of things cannot in all cases be foreseen by the master. If a servant chooses his own position on a bridge in course of construction while a portion of the work is going on, it is not the master's duty to have a representative present to see that the place is safe. The law also holds that it is no part of the duty of a master to his servant, employed in a building properly constructed for the ordinary business carried on within it, to provide a means from fire, in the absence of statutory requirement that a fire-escape be erected. Where scaffolds, platforms, staging and the like are provided servants in connection with their work, the master must see that same are safe; but if such structures are made by the servants from materials furnished by the master, who has no direction or control over their construction, he is not liable for injuries sustained by one of the workmen by reason of defects therein.

In the case of elevators and like constructions, the duty is imposed on the master to see that same are safe and suitable for the purposes for which they are intended; the master's duty is performed in this regard when he purchases his elevator from

reliable and competent manufacturers, has it placed in working order by them and has it regularly inspected by experts. Even though an elevator be primarily intended for a freight elevator, if, in the course of their employment, servants are authorized and directed to use same as a means of personal transportation, the employer or master is liable for any accidents happening from defects in the elevator or operation thereof, which proper care and caution could have prevented.

The duty of a railroad company to its employees is no higher than that required of other masters. It has been held that where an employee of a railroad company is injured by the fall of coal from a locomotive tender which has been improperly overloaded the company is liable. A railroad company is bound to exercise reasonable care and diligence to prevent obstruction or erections on, over or near its tracks, which are a source of danger to its servants, and will be liable for injuries occasioned by its neglect of duty. Thus it has been held that if a railroad company knowingly maintains or permits a bridge over its tracks so low that brakemen cannot perform their duty on top of the cars with reasonable safety, it is liable to a brakeman who, having no knowledge of the dangerous character of the bridge, is struck by it and injured in the performance of his duty.

Not only is it the duty of a master to use ordinary care to furnish his employees with a reasonably safe place to work, and with reasonably safe machinery and appliances, but he must also, by inspection from time to time and by the use of ordinary care and diligence in making repairs, keep them in reasonably safe condition. The rule is, nevertheless, well settled that the mere failure to inspect is not negligence where an inspection would only show what was already known to the servant. Where, however, a careful inspection would not disclose a defect, the master is absolved from liability for not doing so. In many states statutes have been passed providing for official inspection of places of work, machinery and appliances. Such an official inspection does not, however, relieve a master of his duty. For instance, the certificate of a factory inspector approving a fire-escape does not relieve the employer from liability for negligence in not providing a safe landing place. A master is not liable for injuries resulting to a servant by reason of latent defects of which he was ignorant and which could not be discovered in the exercise of reasonable care and diligence. The courts have ruled, however, that a master must keep pace with scientific development as it affects his business, and keep himself and foreman informed of latent danger, even though it be scientific information, if it be

readily attainable. Observation of and compliance with these simple legal requirements would prevent countless injuries and unnecessary litigation.

Contributory Negligence.

In connection with the master's duty toward his employee, as above outlined, it is appropriate to discuss briefly the doctrine of contributory negligence on the part of the employee.

It is the rule of both the civil and common law that one who by his negligence (legally defined as want of proper care under the circumstances) has brought an injury upon himself cannot recover damages for it. The question is whether plaintiff so far contributed to the misfortune by his own negligence or want of ordinary care, that, but therefor, the misfortune would not have happened. If so, there can be no recovery. Contributory negligence on the part of a minor will defeat his right to recover for an injury as in the case of an adult. The law, however, regards a minor under the age of seven years as incapable of contributory negligence. Where both the master and the servant have equal knowledge of the danger of the service and of the means of avoiding it, and the servant, while engaged in the performance of the work he is set to do, is injured by reason of his own inattention and negligence, the master is not liable. An engineer injured while running behind schedule time at a speed greater than was allowable, but which was, according to the practice of the company, excusable in belated trains, is not guilty of contributory negligence and may recover damages for his injury. It has been held that where a conductor went forward to give the engineer warning, although the rule required him to remain in the middle of the train, that the error was a reasonable one and that he was not guilty of contributory negligence. Projecting the person beyond the side of a car constitutes contributory negligence. Getting on or off a moving conveyance is contributory negligence, as is also the failure to "stop, look and listen" before passing a grade crossing.

Where an employee in the course of his employment finds himself in imminent peril through the negligence of his employer, and in the terror of the moment adopts an unsafe course exposing him to a greater peril, such action on his part is not attributed to negligence and will not prevent a recovery.

In the case of a skilled workman operating a dangerous tool, a high degree of care is required on his part. Such person is bound to exercise his thinking faculties and give careful attention, and if he fails to do so and is injured in consequence he is

guilty of contributory negligence which will prevent his recovery for such injuries. Where a servant is killed while on duty, the law will presume that he exercised due care, and the master, to avoid liability, must clearly establish contributory negligence on the part of the servant.

Where a servant continues working with knowledge of danger, which an ordinary prudent man would refuse to subject himself to, he is guilty of contributory negligence, but where a servant notifies his master of defects in the tools, machinery, appliances or ways and places for work and the master promises to remove or repair them, a servant is not guilty of contributory negligence by continuing at work for a reasonable time.

"Fellow-Servants."

Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends to a great extent on the care and skill with which each other shall perform his appropriate duty, each is generally an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of all may require. The negligence of a fellow-employee is one of the risks incident to the employment, and is assumed by every servant who undertakes work in association with others.

A rule of law has consequently been universally adopted by the courts of England and America to the effect that a master is not liable for injuries to a servant caused by the negligence of a fellow-servant engaged in the same general business, where the master has furnished proper means for carrying on the work and has used due care in the selection of servants. It is important to determine who are fellow-servants within the meaning of the rule stated. Speaking broadly, all who serve the same master, work under the same control, deriving authority and compensation from the same source, and are engaged in the same general business, although it may be in different grades or departments of it, are fellow-servants, each assuming the risk of the other's negligence; to constitute fellow-servants, the employees need not be at the same time engaged in the same particular work. It is sufficient "If they are in the employment of the same master, engaged in the same common work and performing duties and services for the same general purpose." Tne captain of a steamboat who is a part owner thereof is not the fellow-servant of a deckhand. A shipper of live stock by accepting a pass permitting

him to accompany the stock and attending it in transit, does not become the servant of the carrier and is not within the fellow-servant rule. Servants of separate masters, although engaged in a common undertaking, are not fellow-servants. A person who is temporarily working for one while in the general service of another must be treated as to that particular employment as the servant of the person thus employing him and the person who has the right to direct and control his conduct in that particular business must likewise be regarded as his master, for the existence of a general relation of master and servant does not exclude a like relation between the servant and a third party to the extent of the special service in which the servant may be actually engaged.

A man who voluntarily assists the servant of another cannot recover from the master for an injury caused by the negligence or misconduct of such servant, since he can impose no greater duty on the master than a hired servant.

It may be stated as a general rule that a servant not on duty is not a fellow-servant of those engaged in the same common employment so as to relieve the master from liability to him for injuries resulting from their negligence. A number of cases have held that servants on their way to and from work are, although not actually on duty, fellow-servants of other employees of the master engaged in the same common employment. Thus a laborer walking on a railroad track to his work and an engineer operating an engine on the track are fellow-servants, and the former cannot recover from the company for injuries caused by the negligence of the latter. A master is required to employ a sufficient number to perform safely his work, and is also bound to exercise diligence in the selection of his servants, and if a servant sustains injuries through the incompetence of a fellow-servant whom the master has been negligent in employing or retaining in service, the injured servant may recover for such injury. The fact that a servant is physically disabled to perform his duties or is too youthful is sufficient to charge the master with negligence in employing him. Should an injury result to one servant from the intoxication of a fellow-servant, the master could not avail himself of the fellow-servant rule if he knew of the drinking habits of his servant. But occasionally taking a drink or occasionally being under the influence of drink does not constitute such a habit of drinking as would authorize a finding that a servant was rendered incompetent thereby.

Workmen's Compensation.

In connection with the legal obligations existing between master and servant, it is to be observed that many of the prin-

ciples hereinbefore discussed have recently been abrogated by the enactment of workmen's compensation laws. The first statute of this nature was enacted by Germany on July 6, 1884. Forty-two nations have since adopted similar laws. In 1910 the first workmen's compensation law was enacted in the United States, and at the present time this beneficent law with its economic and social advantages is practically universal.

The fundamental principle of workmen's compensation is that the cost of industrial accidents should be added to the selling price of the product and be distributed among the consumers. It is based on the principle that the loss occasioned by an injury to a workman is as much a part of the ultimate cost of the article as is the loss occasioned by the destruction of material, the breaking, wearing out and replacing of tools and machinery. From an economic and sociological standpoint it has been found advantageous to include the expense of an injury to a human employee in the cost of the production of a commodity, when the injury is caused by an accident in the course of his employment, whether occasioned by the fault of the employer or of the injured workman, or without the fault of either. The personal loss of an employee is as legitimately an element of the fair money cost of the production of a commodity as are the expenditures for raw material, for machinery and for wages.

The declaration that an employer shall be responsible for injuries to his workmen, without regard to the fault of the employer, is entirely a reversal of the common-law rules and of statutory employer's liability laws.

The doctrine that an employee may recover from his employer for injuries incurred by reason of his own contributory negligence, or the negligence of a fellow-servant, or on account of the inherent risks of the employment, is an abrogation of the rules of common law, but harmonizes with the provisions of many recent statutory employer's liability laws in the United States. The Federal courts with almost complete harmony have held that the compensation principle rests on a sound economic, moral and legal foundation.

The fundamental principle underlying workmen's compensation legislation is the same in those states that have already adopted its system. The specific details governing the operation of the law vary in the different states as radically as the time tables of different railroads, and in the author's judgment, no useful purpose would be served by including in this work an abstract of such laws. There are, however, three distinct advantages of workmen's compensation over common-law and statutory liability laws which it

is important to emphasize. First, it secures promptly to the injured workman, and in case of his death to his dependents, a certain compensation instead of the often long-delayed and very uncertain final result of a lawsuit. Under the compensation system it must be accepted that the number of payments will be greatly increased, but the elimination of the waste incurred in the litigation of claims under the old system will certainly have a material effect in keeping the cost of compensation within reasonable limits; second, the certainty that compensation will be paid is conducive to the contentment of the workmen. The elimination of the probability of a lawsuit between the employer and employee in the event of an injury of the latter, is bound to be productive of a better state of harmony and co-operation. It may be expected to reduce the probability of friction, discord and ill feeling, and bring about a closer and more compatible relationship between the employer and employee; third, the certainty that injuries are to be compensated is the potential factor for safety. It will compel the employer to consider the causes of injuries and the importance of preventing them. It is a silent, automatic and constant argument for the best working conditions. It pleads not merely for safety first but for safety all the time. Under the workmen's compensation acts the employer is bound to compensate his employee for any injuries received in connection with his employment, regardless of the cause. Ordinarily the only classes of employees exempted from this right to compensation are those engaged in domestic service and agriculture, those whose work is both casual and outside of the employer's regular business, and those who, in their own homes, make up, clean, wash or alter material or articles furnished them by their employers. In some states the administration of workmen's compensation laws is vested in the courts, while in other states it is vested in a special commission appointed by the Governor and from whose decision in any contested claim an appeal usually lies to a court of law. The employer who elects to accept the advantages of such acts is ordinarily required to insure his liability unless he can satisfy the court or the commission of his financial responsibility. The consumer ultimately pays the cost. Bradbury on Compensation discusses this phase of the subject in the following language: "It is believed by those who have given the most careful thought to the subject that this expense or burden on the community will be less, in the long run, when the compensation principle is put in operation, than it is at present, when an inadequate provision is made through public and private charity for taking care of the injured

workmen and the dependents of those who are killed. That the widows and young children of the workmen who are killed frequently are dependents upon the community there is no denying. The same is true, of course, as to the families of workmen who are seriously injured, and sometimes to a greater degree than if the workman had been killed. It is often more difficult for a family to get along while the father is seriously injured and requires medical and other attention, than it would be had the father been killed."

The unanimity with which industrial concerns throughout the country have accepted the provisions of workmen's compensation laws is a guarantee of their permanence.

PETITION FOR APPOINTMENT OF GUARDIAN

In the Orphans' Court of County

To the Honorable the Judges of said Court:

The Petition *of*

minor the age of fourteen years, resident within the said County,

respectfully represents:

That born

That the child of

That no Guardian to take care of person and estate.

therefore pray the Court to Guardian for the purpose aforesaid.

And will, &c.,

BUILDING AND LOAN ASSOCIATIONS

Development—Classification—Method of Business—Membership—Withdrawals—Termination.

SO closely interwoven are building and loan associations with the business prosperity of the community that it is thought a discussion of the legal principles regulating their operations will be both interesting and profitable.

A building and loan association is an organization created for the purpose of accumulating a fund from the monthly subscriptions or savings of its members to assist them in building or purchasing for themselves dwellings or other real estate, by loaning to them the requisite money from the funds of the society, upon good security. The primary design of building associations is to encourage the acquisition of real estate, the building of dwellings, the ownership of homesteads; to increase the proportion of property holders among that class of the population whose slow and laborious earnings are by reason of their pettiness most fugitive, and generally spent before they reach a sum sufficient to back a desire for those guarantees of good citizenship which the policy of our law has always found in landed property. That is the class for whose benefit building associations were orginated; from among whose number their membership was, and for the most part is, still drawn; and all the incidents of membership were designed to accommodate their necessities and intended to serve their purposes.

These associations first appeared in the United States about 1831. As we now celebrate their hundredth anniversary in 1931 we find thousands of them playing an outstanding part in the financing of homes. Small home owners rely upon the building and loan association for their mortgage funds. The accumulation by the members of a building and loan association of their money by periodical payments into its treasury, to be invested, from time to time, in loans to members upon real estate for home purposes, is the basic idea of the class of associations under consideration. The borrowing members pay interest and a premium as a preference in securing loans over other members, and continue their fixed periodical instalments in addition, all of which payments, together with the non-borrowers' payments, including fines for failure to pay such fixed instalments, forfeitures

for such continued failure of such payments, fees for transferring stock, membership fees required upon the entrance of a member into the society go into the common fund until such time as the instalment payments and profits aggregate the face value of all the shares in the association, when the assets after payment of expenses and losses are pro-rated among all members, which in legal effect cancels the borrower's debt and gives the non-borrower the amount of his stock.

Three Varieties.

The building association exists in three varieties—the terminating, the permanent and the serial. The first mentioned is seldom found at the present date and consequently will not be discussed. The permanent building association is a society which has not fixed any date or specified result at which it shall terminate. It differs from a terminating society chiefly in the fact that a person may become a member at any time without paying any back subscriptions. Serial associations instead of issuing all their stock to the full extent allowed by law at once divide it up into series and issue each series successively, each class or series being then treated to a certain extent as a separate association distinct from the others, but with them sharing in the profits of the concern. Permanent associations usually adopt the serial plan—that is, an association is incorporated with a specified capital (usually one million dollars) and the stock divided into series. It is provided by the law of Pennsylvania that in dividing the capital stock into series, no such series shall at any issue exceed in the aggregate five hundred thousand dollars. These series may be issued monthly, quarterly or annually, according as the promoters think desirable. Perpetual charters may be obtained under the statute law in most of the states.

Two Classes of Members.

In the development of building and loan associations it was seen that these societies really consist of two classes of members; that those who do not care to have, or have not received, an advance upon mortgage security are mere investors, and that it matters little when they commence investing or in what amount, while those to whom advances have been made are really debtors to the society, and arrangements for enabling them to pay off their debt in various terms of years according to their convenience would be of advantage both to themselves and the society. By permitting members to enter at any time without back payment, and by granting advances for any term of years agreed upon, a

continuous inflow of funds and a continuous means of profitable investment of such funds would be secured. The interest of each member of the society would terminate when his share was realized or his advance paid off, but the society would continue with the accruing subscriptions of other members employed in making other advances. The successive serial issues of stock constitutes its permanent feature, for, although the membership of any individual terminates with the series of stock in which that membership is claimed, yet the association continues on until the last series is wound up.

In "The Working Man's Way to Wealth" the author emphasizes the advantages of the serial association as follows: (1) That it allows a person wishing to become a member to avoid back payments by purchasing stock in the last series; (2) that by loaning the surplus funds of the elder series to the members of the younger a profitable investment can always be insured. When the fact is recalled that the chief trouble in the successful working of the terminating plan arises from the difficulty of obtaining new members, owing to the heavy back payments necessary to equalize them with the first members after the association has reached its third or fourth year, the consequent falling off in the number of stockholders by reason of death or withdrawal, and the difficulty thereby occasioned of finding proper investments for the large sums of money which accumulate upon the hands of the society, the immense practical importance of this feature of the serial system cannot be over-estimated.

Method of Business.

The par value of the stock is fixed by charter or by-law (usually two hundred dollars per share), and each member of the society binds himself on becoming a member to pay a subscription at stated intervals, until the amount in the treasury produced by the sum total of all the subscriptions, together with the profits, is such as will enable the society to pay to each member on every share of stock the par value of that share. Whenever the amount in the treasury at any time equals the par value of one or more shares, that sum is put up at auction, and that member obtains the loan who offers the highest premium, or, in other words, agrees to accept the smallest sum at the time of making the loan in lieu of the par value of his stock at the final distribution.

The borrower continues a member and gives adequate security for the payment of interest on his loan, together with subscription and charges. On the final distribution of the stock those members who have not become borrowers receive the par value of their

shares in cash, while borrowing members get back their bonds and mortgages receipted in full. To secure prompt payment of interest and dues a system of fines and forfeitures is adopted, which at once makes it the interest of the member to discharge his obligations to the society and compensate the latter for the loss of the interest upon the amount due.

The following illustration, it is hoped, will conduce to a clearer understanding of the practical workings of a building and loan association: Suppose that there are a hundred men able to save five dollars out of their monthly earnings. They agree for the purpose of united action and mutual encouragement to put their money together upon fixed days every month, until the whole aggregate shall be sufficient to pay to each of the hundred associates one thousand dollars in cash. It is clear that if all are prompt in their payments the treasure will be ready for division at the end of two hundred months; in other words, letting each monthly payment of one dollar represent a share in the common fund, each share will, at the end of two hundred months, be worth a fixed par value of $200. This period, however, will be shortened if, after each monthly collection of $500 has been made, that sum is at once put out at interest, upon some safe investment, with the addition of the interest, etc., accruing to the fund. The distribution of $200 to each share may be feasible in, say, one hundred and eighty months, when each associate has, in fact, paid only $180 on each of his five shares—that is, has paid in $900 up to the time when he is entitled to receive $1,000. Thus far, we have only co-operative savings fund, the stated payments being periodical and compulsory. But the persons who started this association idea had an object beyond the mere saving of money; they desired through it to acquire houses or homes; when, therefore, the question of investing the money arose, it was found that it might be made the means of securing to some of the members particularly anxious to become their own landlords the property upon which they wished to build, and the money to defray the expenses of building, they paying the interest upon the amount loaned them. In this way the money which belonged to all would assist the individual, and he, while he continued to pay his instalments, would in paying interest on the money advanced to him in fact be paying it in part to himself, and would himself help to hasten the day when he would be entitled to participate with the others in the distribution of the common funds, his share in which might then at once be devoted to the extinguishment of the loan he had received. Thus, he could get his house perhaps a number of years before his monthly pay-

ments of five dollars could be expected to amount to a sum sufficient to pay for it; and yet those small payments, being kept up by him, would in time equal the sum he had borrowed, and he would have his house free, virtually paying for it in instalments of five dollars monthly and the interest on the amount he had borrowed. Such a bargain he could get nowhere else; and it stands to reason that more than one member should endeavor to obtain the advantage of being able to pay so gradually for his house and yet have it all his very own. Hence, whenever there is a sum of money ready for investment there will probably be a number of applicants, and it will be a matter of embarrassment to know to whom to give the loan. But this awkwardness is again turned into a source of profit. Among those who apply there will be some to whom, for various reasons, the accommodation will be of considerably more moment than to others. It will be worth more to some than to the rest, and this difference will probably be capable of expression in dollars and cents. The loan, therefore, is put up at a sort of auction. Various members desirous of obtaining it bid against each other for the preference, agreeing that they will receive the sum offered, less the amount bid by them. This difference is called the premium, or bonus, which he undertakes to pay, together with the amount actually received by him, the two constituting his whole debt, to be discharged in the same manner and at the same time. It is a rule with building societies that a member's indebtedness by loan shall not exceed the paid-up value of the number of shares he holds in the association.

Sources of Profit.

The sources of profit relied upon by building and loan associations are interest on the loans to members, premiums and fines. The fact that the money so obtained is at once reinvested, and in like manner the interest derived therefrom, and so on, enables the non-borrowing member to realize compound interest on his subscription; while to one wishing to become a borrower the fact that the loan can be repaid in small monthly instalments, and that the sum advanced is greater than private individuals would be willing to lend on the same security, offers substantial advantages. This the association can do without risk, since as each instalment is paid the security is by that much increased; thus property which at first might well seem inadequate security will at the end of six months be ample. To the workingman, above all, do these societies when honestly conducted commend themselves, in that their management is perfectly democratic, and

that they have no preferred class to share its profits, no heavy sinking fund to create and hold in reserve against possible contingencies, and in that it is the only plan by which he can become his own capitalist and create a source of wealth from which he can supply all reasonable demands, without the aid or interference of the outside capitalist. These organizations have greatly strengthened our democracy by promoting a nation of home owners.

At the present time shares in a building and loan association mature in about eleven years and six months, depending on their conservative management. Some of these associations have earned eleven per cent profit.

A marked feature of a building and loan association is the mutuality of the system upon which its business is regulated. If, for example, one man lent another $800 upon an agreement that the latter pay him $1,000 in monthly instalments of twenty dollars in addition to legal interest upon the amount received, the contract would be clearly usurious. Still less inviting would the arrangement appear if the obligation of the unhappy debtor was enforced by an elaborate system of fines and forfeitures. There must, therefore, be something peculiar to the building association loan by which the debtor receives something in return for the liabilities which he assumes, and by which the transaction, though apparently usurious and oppressive, is really rendered equitable and mutual. The mutuality lies in the fact that after the loan, the borrower still retains his membership in the association and all the rights and privileges belonging thereto; he stands to the association in the twofold relation of debtor and member. As debtor, he is bound to pay premium, interest and dues; as member he has a proportionate interest to the extent of his stock in his own payments; and whatever profit the association may derive from their future investment redounds to his own advantage by hastening the day of final settlement, and thereby shortens the time during which the payments must be continued. He is interested in his subscriptions both at the time of payment and at the final settlement and hence in principle, "The borrower at usury is himself also a lender at usury."

Having pointed out the system under which building and loan asssociations are conducted, let us direct our attention briefly to their general powers and liabilities.

Building associations possess all the attributes of corporations. Whether any particular power is implied in the charter depends

on whether its exercise would be conducive to the accomplishment of the legislative intent in creating the corporation. A building and loan society has no power to make by-laws which are inconsistent with the law of the land, its charter, or the statute under which it was created. A member is charged with notice of the association's by-laws and is bound by such of them as are not repugnant to the rule just stated.

Members of a building association are liable by virtue of their membership for subscriptions, stock payments or dues; for fines and forfeitures, and for contribution to the losses and necessary expenses of the organization. This rule applies to a borrower as well as to a non-borrower.

Membership.

It may be stated as a general rule that any person capable of entering into a contract may become a member of a building association by becoming the holder of its stock. Certificates issued by a building society, conforming to the description of stock mentioned in the by-laws, and in the statute under which the society was organized, and on which dividends are to be paid out of the profits, are certificates of stock, and the holder thereof is a member subject to all the liabilities imposed by the by-laws or statutes.

Failure of a member to sign the constitution, if he has acted as a member for a long time, will not prevent the association from enforcing a contract with him which it was authorized to make with none but a member. Independently of expressed statutory authorization, a corporation cannot become a member of a building and loan association. In most states, however, certain corporations are permitted to become members. The executor or administrator of a deceased member does not become a member, nor will a suit brought by him to enforce a liability of the society to the decedent, or an attempt to avail himself of the privileges of membership, render him such. If, however, he takes advantage of a rule allowing him to become a member, and is recognized as a member by the association, the relationship is created. In all dealings between the association and its members the stock book is evidence of membership.

The by-laws regulating the rights and liabilities of members differ to a limited extent in the various associations, but the general principles are about the same. A member who is not in arrears in the payments of his instalments is entitled to a loan on his stock, where such loan has been duly applied for, and the association is in funds properly applicable to that purpose

Each member in good standing is entitled for each share held by him to the same amount of the assets. A member may enforce an accounting by the association of profits where the association has abrogated charter provisions to his injury and without his consent. A member may sue the association to restrain any unlawful action by it, notwithstanding he has pledged his stock as collateral to a loan; where each shareholder is entitled to one vote for officers, every voter must be the holder of at least one share of stock.

Subscriptions, stock payments or dues may be defined as the fixed periodical contributions upon each share of stock held which by virtue of the original undertaking of membership in the society the holder thereof is liable to pay, whether he remains an investor or becomes a borrower. The undertaking is absolute and the misbehavior of other members, such as their refusal to live up to their engagments, their persistent and deliberate default in the payment of dues, will not excuse similar conduct on the part of any particular one, nor relieve him of his liability to the association for his stipulated stock payments. In fact the association may maintain an action of assumpsit against a member for his dues, and it is not necessary that it should give the member notice of his delinquency. A statutory direction to corporations generally to give notice to members of calls upon unpaid subscriptions does not apply to a corporation under whose by-laws the subscribers to its stock are under a continuing requirement to pay a periodical instalment of a fixed amount on each share. Hence, it has no application to a building and loan association.

The statutes in most states regulating building and loan associations generally give them a lien upon the defaulting member's shares for the amount of the unpaid instalments and other charges and liabilities of membership.

To secure the prompt payment of dues, fines are imposed upon delinquent members, and the members may even be made liable to forfeiture of stock. Fines may be defined as impositions in the nature of liquidated damages upon members neglecting to pay at the proper time to the society any moneys which are due to the latter from them. They are essentially an incident to membership in the association, the direct outgrowth of the obligation resting upon every shareholder, regularly and punctually to pay the dues accruing periodically upon his stock. If a member obtains a loan from the association, not only may his mortgage or deed of trust be made to secure the payment of dues, but fines also.

Dues and fines are payable in cash, and the treasurer has no

right, and cannot be authorized by the officers, to receive anything but cash in payment thereof. The power to impose fines depends upon authority conferred by statute, and in the absence of such authority they cannot be enforced, and if paid by a borrower may be set off from the amount due by him to the association. Fines cannot be collected at all unless they are imposed by charter or by-law, and when so imposed they must be certain and notorious. If the by-law imposing them admits of several constructions, the court will adopt that most favorable to the member and least favorable to the association. Fines must be reasonable and a second fine cannot be imposed for non-payment of the same dues, and interest cannot be charged upon fines. The proper measure of fines is the real damage the building association sustains from the failure of a member to pay his dues, which damage is really equal to interest upon the amount, together with the proportion coming to it from the then obtainable premiums upon the sale of money. The fines should be slightly in excess of this, so as to make it more profitable to the member to pay promptly than to lag behind.

In addition to fines, the rules of most societies establish a limit beyond which indulgence cannot be claimed by derelict members, by providing for the forfeiture of their shares, when that limit is exceeded. Such rules not imposing too short a period of grace have expressly, upon general principles of law, been held reasonable and within the legal power of building and loan associations.

As in the case of fines, so also in the case of forfeitures it is necessary that the causes of their occurrence should be distinctly defined by by-law, and the method of their enforcement, as there pointed out, must be exactly followed. Forfeiture of stock is necessary forfeiture of membership and when it takes place the obligation to continue the payment of dues, the consequence and necessary incident of membership, is at an end.

Intimately connected with the matter of forfeitures of stock on default of members is the question of accelerating payment for a like cause. A provision in a mortgage to secure an advance that in case of failure to pay the prescribed contribution, interest, dues or fines, for a time specified, the whole sum advanced, together with all dues and fines owing by the mortgagor, shall be deemed due, and may be collected, is lawful.

Every member, being equally entitled with all the others in the direct ratio of his interest in the society, to share in the common gains of the enterprise, is liable to contribute in the same proportion in which he expects to profit, to the losses and expenses

incident to its management. A member cannot evade such liability by a transfer of the stock without the consent of the association, nor can he be allowed to withdraw for the purpose of escaping his just proportion of the common burden. Nor is his liability in any way affected by the fact that he has become a borrower, so long as he still continues a member.

Ordinarily a member is entitled to transfer his stock by assignment, but a by-law which provides that no share shall be transferred while any due of any kind against the owner thereof remains unpaid creates a lien upon the shares as against the stockholder for the indebtedness against him.

Withdrawals.

The right of withdrawal from a building and loan association is absolute and cannot be arbitrarily withheld, and where given by statute cannot be waived even by an express declaration in the certificate. Before a member can exercise this right, however, he must comply with the terms prescribed in the by-laws and voluntarily assumed by him. Inasmuch as a member's relation to the association is essentially that of one of a partnership for a definite period of time, entitled upon its expiration to the profits upon his investment in the enterprise, his failure to continue in the concern is in the nature of a breach of contract, upon which the loss of his previous contributions might not unnaturally be held to follow. To avoid such contingency, therefore, a provision, as politic in the interest of the building association as it is just and reasonable to its members, is usually made an integral part of the scheme, that a member desiring to withdraw shall be allowed to do so, with the privilege of receiving from the society the amount paid in by way of subscription (after deducting all fines and charges against him), together with such share of the profits of the association as may appear just and warranted by its business.

The right to withdraw does not entitle the member to an account of profits, but merely to a sum equal to subscriptions paid in, less fines and legal charges, and to such proportionate amount of the profits as the by-laws may declare. Acceptance of notice of withdrawal terminates membership in the association; the member at once assumes the position of a creditor, and may recover the amount due. A prescribed notice of withdrawal is usually required by the by-laws, but such notice need not be in writing, unless expressly required so to be, and it has been held that even where required, the association may waive a written and accept an oral notice.

In construing a by-law relative to withdrawal, the court will lean toward the construction that is most favorable to the members. For instance, the by-laws of an association provide that in case any member, by reason of sickness, removal, or through misfortune, is unable to continue the payment of his subscription, he may give notice to the secretary of an intention to withdraw from the association; and in case the directors are satisfied as to the grounds of withdrawal his whole amount of subscription shall be returned except the entrance fee, and that any person wishing to withdraw for the above reason or otherwise, and who shall have been a member for a certain length of time and be clear of the books, shall be entitled to a certain interest on that amount. In such a case the court decided that any person having been a member for the time specified and being clear of the books might withdraw without leave of the directors, and was entitled to the benefits set forth in the by-laws. The requirement of the directors' approval applies only to those who wish to withdraw for the reasons given in the by-laws and who have not been members for the specified time.

The right to withdraw does not entitle the member to an account of profits, but merely to a sum equal to subscriptions paid in, less all fines and legal charges, and to such proportionate amount of the profits as the by-laws may provide.

A member who has perfected his right to withdraw by complying in all respects with the requirements of the governing statute is not estopped, by a proviso that at no time shall more than one-half the funds in the treasury be applied to the demands of withdrawing stockholders, from bringing suit for the recovery of the amount due until the treasury has funds sufficient to meet his claim. To hold otherwise would enable the association to defraud a member of all benefit from his right of withdrawal by keeping itself in a state of insolvency. The proviso merely intends that the operations of the society should not be embarrassed by having the whole amount of its cash assets taken in order at once to pay the withdrawing stockholders; and this object is amply served by enabling the court to restrain the plaintiff's execution in order to give the building association a reasonable time to raise the money without undue derangement of its affairs.

The later decisions have held that a withdrawing stockholder who held a withdrawal order from the treasurer of the asociation for the withdrawal value of his stock was not a creditor within the meaning of the assignment laws governing assignments for the benefit of creditors, and was not entitled to any priority over other

members. While in a qualified sense withdrawing stockholders may be considered creditors of the association, their rights as against those with whom they have been associated are very different from those of general creditors whose claims are based wholly on outside transactions. If the association has been prosperous, they have a right under certain limitations and restrictions to demand and receive their proportionate share of the accumulated fund. But if bad investments have been made, or losses have been sustained before actual withdrawal, they must bear their just proportion thereof. The right of withdrawal and the extent to which it may be exercised presupposes that at least a relative proportion of the assets will remain for the benefit of those who continue to be active members of the association. After expenses, incident to the administration of its assets, are deducted, the general creditors, if any, should be first paid in full, and the residue of the fund should be distributed among those whose claims are based upon the stock of the association, whether they have withdrawn and hold orders for the withdrawal value of their stock or not. Both classes are equally meritorious, and in marshaling the assets neither is entitled to priority over the other. The claims of each are alike based upon their relation to the association as members thereof. Orders issued to withdrawing stockholders are merely evidence of their interest in the assets remaining after paying general creditors.

It is, however, a right belonging to every member of a building and loan association, by virtue of his membership, in a proper case and under proper circumstances to invoke the jurisdiction of a court of equity to wind up the society and thus compel a settlement.

Right to Receive Loans.

The right to receive a loan is an essential incident of membership, and arises from the nature and objects of the association. An association having funds cannot refuse to lend them to its members in good standing offering proper security. The power to lend money to members when not expressly conferred by charter may be implied from the general object of the association. If a statute confers expressed power to lend money to shareholders upon such terms and conditions as may be prescribed by the by-laws, a loan made otherwise is not *ultra vires.*

The incidents of loans of the character under consideration are (1) stock payments or dues; (2) interest; (3) fines; (4) premiums; and (5) security.

Stock payments or dues are properly an incident of mem-

bership in every building and loan association, and are only incident to a loan in so far as the security is conditioned upon their continued payments.

Interest is so much an ordinary incident to a loan that the authority to loan implies the right to take it. It must be of the legal rate, and cannot be charged upon more than the amount actually advanced. The interest reserved by a building and loan association upon an advance to one of its members ceases when it is reimbursed for the advance. In many building associations interest upon the loan and stock payments are consolidated under the name of redemption money or dues, and formed in a single payment. When the dues have been so united by the by-laws their subdivision for the purpose of imposing separate fines for the non-payment of each is improper.

Suits by Stockholders.

A withdrawing stockholder in a building and loan association can only recover the withdrawal value of his stock under the constitution and by-laws of the association, and not its par value, even though it has matured After the maturity of the stock, a stockholder is entitled not to the matured value but to an equal division of the assets, less expenses and losses.

Building and loan associations form no exception to the general principle that a stockholder as a stockholder cannot sue the corporation. If he is not content to await the winding up of the concern his course is to withdraw and bring suit as a withdrawing stockholder.

It follows from this doctrine that payments upon stock are not payments upon the loan "which is a necessary consequence of the fact that stock payments are incident to membership;" that is, that payments of dues are not intended to be applied as soon as made as partial payments to the extinguishment of the debt, but are paid as the capital of the company, and paid alike by those who do and do not take loans; that the figure upon which the interest is to be paid, and hence the amount of interest itself, do not vary from the time of taking the loan until it is finally discharged, and that consequently the reservation of an unvarying amount of interest for the whole period of the loan, whilst at the same time the borrowers' stock payments are going on, is not usurious.

Fines may be imposed for non-payment of either subscriptions or interest. As previously defined in these pages, the premium is a bonus charged to a stockholder wishing to borrow, for the privilege of anticipating the ultimate value of his stock,

by obtaining the immediate use of the money his stock will be worth at the winding up. It is in effect the difference between the par value of the share advanced and the amount actually received by the borrower. It is not a cash payment, which he is obliged to make upon obtaining his preference nor can it properly be said to be a deduction made at the time from any money belonging to him. It is in substance the pecuniary standard by which the value to the member who obtains the loan, of the preference over other members seeking the same, is determined. Since, however, in offering its money to borrowers, the society adopts as the basis of its loan the par value of its stock for purposes of computation, the premium must be treated as a deduction and must ordinarily be a gross amount per share, not merely increased interest. The amount of the premium must be determined by fair and open competition.

The weight of authority is to the effect that interest cannot be charged upon the premium.

It is, of course, within the discretion of the building association to allow abatements, discounts or remissions upon the premium bid by an applicant for a loan under specified conditions.

The power to loan money implies the power to take adequate security for the repayment of the loan, and in the absence of expressed requirement in the statutes or charter that the security taken shall be such and no other, building and loan associations have power to loan money on the same security as individuals, notwithstanding their usual custom is to require the borrower to assign his own stock as collateral to his mortgage. The mortgage or deed of trust of a third person may be taken to secure a loan to a member, and a wife having power to mortgage her separate property for the debt of her husband may give a mortgage to a building association to secure a loan made to him, and in either case the mortgage will stand for the full extent of the undertaking, including interest, fines, dues and charges. In such case the association is under no obligation to notify the third person of the member's default.

Such mortgages secure the payment of a series of small sums during an indefinite period of time. Yet though the time during which the payments are to be made is not specified, there is a contingency stated in the mortgage on the happening of which the payments are to cease; and its duration may be ascertained by proof, or approximated with as much certainty and exactness as the duration of a mortgage securing an annuity for the life of a person. The mortgage, therefore, is not void for uncertainty. but a valid mortgage in law.

In case the stipulations for the payments of dues and interest are not complied with by the mortgagor, there is a provision inserted for the foreclosure of the mortgage and sale of the encumbered property. In such cases the ordinary course of procedure in equity is to take a preliminary account of the actual arrears and charges standing against the borrower up to the time of the decree, deducting the credits to which the borrower is entitled. If he pays the amount thus found, the sale will be prevented, and the decree will stand against him as security for future payments. If he refuses or neglects to pay them, the sale must take place, and the premises mortgaged will be discharged of the encumbrance.

Mortgages.

A mortgage taken by a building association is security for the payment of money only within the statute and operative only so far as authorized by it, and by the by-laws of the association. The bond and mortgage or trust deed given by the borrower evidences the terms of the contract and cannot thereafter be varied without his consent.

There are three classes of building and loan association mortgages: those in which the condition calls for regular stock payments of fixed amounts and performance of membership duties and liabilities generally, together with the payment of redemption money or interest on the amount advanced (being frequently lumped together with stock payments under the name of dues), to the end of the society's existence; those in which in addition the sum advanced is made repayable; and those in which the nominal amount of the loan, the par value of the shares, including the premium, is made payable, with interest, stock payments, etc., being stipulated as in other cases.

In the first form the obligation is for the payment of dues, etc., solely; in the second, the obligation is nominally for the repayment of the loan, but particularly for the payment of monthly dues on the stock, and the legal interest on the loan until the association is able to divide, to each share of stock held by the members, the sum of two hundred dollars ($200), and when this result is reached, as the association would owe a borrower on five shares of stock one thousand dollars ($1,000) and the borrower would also owe the association $1,000, one debt cancels the other. The third differs from the second only in the fact that interest may be charged upon the premium bid, as well as on the sum actually advanced, which in nowise affects the nature of the transaction.

There is much diversity of opinion as to the nature of the

transaction by which a building association loans or advances its funds to members. Some courts regard the transaction as a loan. Others deem it to be a dealing in partnership funds. Others hold it to be an advance on the stock which the borrower expects to be entitled at the termination of the association, while others consider it as a sale by the borrower of his shares of stock to the association.

It has been ruled that a bond and mortgage executed to a building association by one of its members to secure an anticipated loan cannot, if the loan is not made, be retained as security for items owing to the mortgagor, which were to be deducted from the gross amount of the loan when made, where they were neither given nor received as security for such items. Although the mortgage provides that the entire amount secured thereby shall become at once due and payable on default for a specified time in the payment of interest and instalments, the association is not compelled to act at the expiration of the specified time in order to protect its rights.

Where at the time of borrowing it is estimated that the stock will mature and pay the loan in a certain time and a note is given payable in such time, a mortgage given to secure such note may be foreclosed at the expiration of such time, even though the stock has not then matured.

Important Decisions.

The right of an association taking an assignment of a member's shares of stock as collateral security for a loan, for which the member had also given a mortgage, to appropriate such shares at their maturity to the satisfaction of the loan, instead of exhausting the security furnished by the mortgage, is not affected by an attachment of the stock by a judgment creditor of the member. Where a shareholder in a building association has assigned his stock to the association as security for a loan, which is also secured by a judgment, he may elect, on sale of his real estate by the sheriff, to have the value of the stock deducted from the amount of the judgment before such judgment is permitted to share in the proceeds of the real estate.

It is important to understand clearly the rule adopted for ascertaining the amount presently due upon a mortgage in case of foreclosure or voluntary redemption. The rule as followed in most jurisdictions requires the probable or possible duration of a society to be approximated by proof, and the aggregate of all the dues or redemption money stipulated for in the mortgage to be calculated as they would accrue during that period, and the

whole amount thus found to be charged against the member as a present debt immediately due, in addition to all arrearages and fines. In other jurisdictions the same rule is followed except that when the interest is lumped with stock payments there is a rebatement of interest for the time between the repayment of the loan and the estimated termination of the society, so that the society will not recover interest after that which bears interest, the loan, has been returned to its hands. The rule applies equally to the case of a foreclosure or a redemption, the only difference being that in the latter a withdrawing borrower is entitled to the bonus or proportionate share of the profits allowed by the governing statute or the by-laws of the association. In Pennsylvania the leading case, so far as it relates to voluntary repayments, proceeds from the provisions of the statutes, and, as for the rest, treats the transaction as a loan which must be repaid, but to which the borrower may apply his stock payments already made.

Where an association is prematurely dissolved and the mortgages of members foreclosed, in determining the amount due, the mortgagors should be allowed not only for the sums paid by them as dues, but also for what they paid as interest, while they are to be charged interest on the sums advanced by the association, and so from time to time on the balance of such sums, after deducting therefrom the money paid by them for dues and interest.

A shareholder can set off as against the amount due by him to the association under the mortgage claims held by him against it, consisting of balances due from the association to members who had withdrawn from the association and assigned by them to the mortgagee. Therefore, in striking an account between the association and a borrowing member wishing to redeem and withdraw, the latter is to be credited only with his actual payments on account of stock and interest, and not with any of the profits thereon unless special statutory enactments or the by-laws of the society allow him some share of the profits. Otherwise, for the profits, the society is accountable only on dissolution, and then only to those who have persevered in its membership. It has been decided that where a mortgage given by a member of a building and loan association to it becomes divested and payable in consequence of a judicial sale of the mortgaged premises upon the member's decease, that the association is bound to make the same allowances upon the mortgage as if the member had elected to pay off the loan and withdraw.

In ascertaining the amount due it has been held that the court is bound by the terms of the mortgage and cannot look

beyond the articles of association, unless the latter are so referred to in the instrument as to make them a part of the mortgage or call the court's attention to them. But the rule is not to be so extended as to preclude the court from examining the articles of association for the purpose of determining when the mortgage contract terminated. It should be borne in mind that in serial societies the rules above laid down apply with this only difference, that the rights and liabilities of each member are referable, in the first instance, to the series to which he belongs.

A sale of the mortgaged premises and application of the previous stock payments made by the mortgagor to the extinguishment of the debt terminates the membership of the mortgagor in the association, and the obligation to continue payment of dues in consequence of membership ceases. If, however, neither the building association nor the borrower applies the previous stock payments to the extinguishment of the debt, and the association collects the whole sum due from the proceeds of the sale of the mortgaged premises or upon voluntary repayment, the whole debt undiminished by any stock payments is returned to the society. The stock remains intact, and the member continuing to hold it retains his membership, and is entitled upon the final distribution to his share in the company's profits. In such case his bond and mortgage remain in the hands of the association as a subsisting security to insure the payment of future instalments and liabilities.

Application of Stock Payments to the Extinguishing of the Debt.

The doctrine is well recognized that payments of dues upon the stock are not payments upon the mortgage debt, and do not work an extinguishment of the mortgage in part. But the borrower, by virtue of his membership, has a right at any time so to apply them, and the association holding a lien upon his shares as security for his debt may, in case of default, make a like application. But in the latter case the appropriation by the society must be prompt and unequivocal. By such application on the part of the borrower the stock is relinquished to the association and its value deducted from the amount of the debt owing to it and its membership destroyed. The borrower's representative, his assignee for the benefit of creditors, or executor, may also make the application, but in some states it has been held that a sheriff's vendee of the mortgagor cannot. When a member borrows money from the association and gives a joint note of himself and another person for the advance, and the borrower's stock being assigned to the association as additional security, the third party has the right to have the stock sold first for the debt. On the other hand,

the title to the stock has so far passed from its owner by the assignment, that a subsequent purchaser cannot prevent the association from applying the sums paid thereon in extinguishment of the debt. Where stock is pledged and a mortgage given for the same debt, the mortgagor has the right to insist, as against his assignee in bankruptcy and an assignee of the mortgage, that the stock be first sold to reduce the amount of the mortgage lien and of the mortgagor's personal liabilities.

A member who has assigned his stock to a third person as collateral security for a debt, cannot, when sued upon his mortgages to the association, claim a credit for the value of his shares.

As between the association and a second mortgagor of the premises, stock held by the association as collateral security will be first applied to the payment of the amount due on the mortgage to the association before recourse is had to the mortgaged premises.

There is a class of cases in which the right of applying the stock payments upon the borrower's stock, held as collateral by the building association to the extinguishment of the debt also secured by mortgage in favor of the same, seems to be confined to the original parties to the transaction, the borrower and the society, and in which the right of any third party to compel the society to so apply them seems to be denied.

It has been held in New Jersey that where the building association holds, besides a mortgage upon the borrower's land, an assignment of his stock as collateral to his mortgage, and releases the stock with actual notice of the existence of a subsequent mortgage on the land, that the prior mortgage was, so far as the right of the subsequent mortgage was concerned, satisfied to the extent of the value of the stock.

Membership in a building and loan association, in the absence of some by-law to the contrary (which is rare), does not entitle the borrower upon voluntary repayment of his loan to a proportionate share of the profits to the time of repayment, and even where express provision exists in the constitution or by-laws a defaulting member can claim no such benefit.

Winding Up the Association.

The last feature of building and loan associations which we shall discuss will be the manner in which their business is terminated.

Hopeless insolvency, rendering the accomplishment of the purposes of the association impossible, is a good ground for a petition by members to the court for the winding up of its busi-

ness and the appointment of a receiver. The insolvency of a building and loan association is a thing peculiar to itself and consists in its inability not to pay outside debts (for such a case can hardly ever occur), but to satisfy the demands of its own members. Hence it has been repeatedly asserted that the application must proceed from persons interested and suing as members.

The right to invoke the aid of a court of equity for the appointment of a receiver for the purpose of winding up the affairs of the association arises where, in point of fact, the time has arrived when the shares, owing to the past accumulations of the business, are worth the stipulated par value fixed by the charter. Such an application must show that the assets of the association are sufficient to pay, over and above the losses and expenses and after cancelation of the advanced members' securities, to every unadvanced member the par value of his stock. In ascertaining the sufficiency of the corporate assets for this purpose mortgages held against advanced members must not be counted as assets. Whenever the assets of the association become equal to the par value of all its stock it is ready to be wound up. However, from a practical standpoint, as soon as one series are taken care of, another series is started, and thus this form of association becomes perpetual.

Whatever liabilities the association has lawfully incurred are, of course, protected upon dissolution. Creditors and depositors are entitled to be paid out of the assets in priority to any of the members, and where a member is also a creditor or depositor he is entitled to come in upon the distribution of the assets as such.

BUILDING AND LOAN BOND AND WARRANT OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, *That*
(hereinafter called the Obligor),
held and firmly bound unto

(hereinafter called the Obligees),
in the sum of *Dollars*,
lawful money of the United States of America, to be paid to the said Obligees, their certain Attorney, Successors or Assigns. To which payment well and truly to be made, do bind
Heirs, Executors and Administrators, and every of them, firmly by these presents. Sealed with Seal . Dated the

day of , in the year of our Lord one thousand nine hundred and

THE CONDITION OF THIS OBLIGATION IS SUCH, *That if the above bounden Obligor Heirs, Executors and Administrators, or any of them, shall and do well and truly pay, or cause to be paid, unto the above named Obligees, their Attorney, Successors or Assigns, the just sum of Dollars, such as abovesaid, at any time within year from the date hereof, together with interest for the same in like money, payable monthly, and together with all fines imposed by the Constitution and By-Laws of the aforesaid Association, and a monthly premium of for the same, in like money, payable monthly, on the of each and every month hereafter, and shall also well and truly pay, or cause to be paid, unto the said Obligees, their Successors or Assigns, the sum of Dollars, on the said of each and every month hereafter as and for the monthly contribution on Share of the Capital Stock of the said Obligees, now owned by the said Obligor , without any fraud or further delay; and shall also deliver to the said Obligees, their Successors or Assigns, on or before the day of of each and every year, receipts for all taxes of the current year assessed upon the premises described in the accompanying Indenture of Mortgage; and also from time to time and at all times until payment of the said principal sum, keep the building mentioned in the said Mortgage insured against loss or damage by fire for the benefit of the Mortgagees in the sum of Dollars.* PROVIDED, *however, and it is hereby expressly agreed, that if at any time default shall be made in the payment of the said principal money when due, or of the said interest, or of the said fines, or of the said monthly premium, or the monthly contribution on said Stock, for the space of months after any payment thereof shall fall due, or in such delivery to the said Obligees, their Successor or Assigns, on or before the day of of each and every year, of such receipts for the taxes of the current year upon the premises mortgaged, or in the maintenance of such insurance, or if the said Obligor shall not well and truly pay or cause to be paid, the taxes, on the premises particularly described in the Mortgage accompanying this Obligation, when the same shall become due and payable, and also shall not well and truly pay, or cause to be paid, all and every such sum or sums as shall hereafter be assessed by any public authority upon the said*

principal debt or sum, or upon the interest thereof, then and in such case, the whole principal debt aforesaid shall, at the option of the said Obligees, their Successors and Assigns, immediately thereupon become due, payable and recoverable, and payment of said principal sum, and all interest, and all fines, and all monthly premiums due thereon, as well as any contribution on said Share of Stock then due, may be enforced and recovered at once, anything hereinbefore contained to the contrary thereof notwithstanding. And it is hereby further agreed, that if the same, or any part thereof, has to be collected by proceedings at law, then an Attorney's fee of per cent shall be added to and collected as a part of the costs of such proceedings, besides all expenses of effecting such insurance. And the said Obligor for Heirs, Executors, Administrators and Assigns, hereby expressly waive and relinquish unto the said Obligees, their Successors and Assigns, all benefit that may accrue to by virtue of any and every law, made or to be made, exempting the premises described in the Indenture of Mortgage herewith given, or any other premises or property whatever, from levy and sale under execution, or any part of the proceeds arising from the sale thereof, from the payment of the moneys hereby secured, or any part thereof, and the cost of such action and execution; then the above Obligation to be void, or else to be and remain in full force and virtue.

SEALED AND DELIVERED
IN THE PRESENCE OF US:

To Esquire, Attorney of the Court of Common Pleas, at , in the County of , in the State of , to any other Attorney, or to the Prothonotary of the said Court, or of any other Court, there or elsewhere.

WHEREAS,

in and by a certain Obligation, bearing even date herewith, do stand bound unto

in the sum of

Dollars,

lawful money of the United States of America, conditioned for the payment of the just sum of

Dollars, such as abovesaid, at any time within year from the date thereof, together with interest for the same, in like money, payable monthly, and

together with all fines imposed by the Constitution and By-Laws of the aforesaid Association, and a monthly premium of for the same, in like money, payable monthly, on the of each and every month thereafter, and should also well and truly pay, or cause to be paid, unto the said Obligees, their Successors or Assigns, the sum of Dollars, on the of each and every month thereafter, as and for the monthly contribution on Share of the Capitol Stock of the said Obligees, now owned by the said Obligor , without any fraud or further delay; and should also deliver to the said Obligees, their Successors or Assigns, on or before the day of of each and every year, receipts for all taxes of the current year assessed upon the premises described in the Mortgage accompanying said Obligation, and also from time to time and at all times until payment of said principal sum, keep the building mentioned in the said Mortgage insured against loss or damage by fire for the benefit of the Mortgagees in the sum of Dollars.

PROVIDED, *however, and it is thereby expressly agreed, that if at any time default should be made in the payment of the said principal money when due, or of the said interest, or of the said fines, or of the said monthly premium, or the monthly contribution on said Stock, for the space of months after any payment thereof shall fall due, or in such delivery to the said Obligees, their Successors or Assigns, on or before the day of of each and every year, of such receipts for the taxes of the current year assessed upon the premises mortgaged, or in the maintenance of such insurance, or if the said Obligor shall not well and truly pay, or cause to be paid, the taxes, on the premises particularly described in the Mortgage accompanying said Obligation, when the same shall become due and payable, and also shall not well and truly pay, or cause to be paid, all and every such sum or sums as should thereafter be assessed by any public authority upon the said principal debt or sum, or upon the interest thereof, then and in such case, the whole principal debt aforesaid should, at the option of the said Obligees their Successors and Assigns, immediately thereupon become due, payable and recoverable, and payment of said principal sum, and all interest, and all fines, and all monthly premiums due thereon, as well as any contribution on said Share of Stock then due, might be enforced and recovered at once, anything thereinbefore contained to the contrary thereof notwithstanding. And it is thereby further agreed, that if the same, or any part thereof*

has to be collected by proceedings at law, then an Attorney's fee of per cent should be added to and collected as a part of the costs of such proceedings, besides all expenses of effecting such insurance. And the said Obligor for Heirs, Executors, Administrators and Assigns, thereby expressly waived and relinquished unto the said Obligees, their Successors and Assigns, all benefits that might accrue to by virtue of any and every law, made or to be made, exempting the premises described in the Indenture of Mortgage therewith given, or any other premises or property whatever, from levy and sale under execution, or any part of the proceeds arising from the sale thereof, from the payment of the moneys thereby secured, or any part thereof: THESE *are to desire and authorize you, or any of you, to appear for Heirs, Executors or Administrators, in the said Court or elsewhere, in any appropriate action, there or elsewhere brought or to be brought against Heirs, Executors or Administrators, at the suit of the said Obligees, their Successors or Assigns, on the said Obligation, as of any Term or Time past, present, or any other subsequent Term or Time, there or elsewhere to be held, and confess or enter Judgment thereupon against Heirs, Executors or Administrators, for the sum of Dollars, lawful money of the United States of America, debt, besides costs of suit and all expenses of effecting insurance as aforesaid, by* Non sum informatus, Nihil dicit, *or otherwise, as to you shall seem meet: and for your or any of your so doing, this shall be your sufficient warrant. And do hereby, for Heirs, Executors and Administrators, remise, release, and forever quit claim unto the said Obligees, their certain Attorney, Successors and Assigns, all and all manner of Error or Errors, Misprisions, Misentries, Defects and Imperfections whatever, in the entering of the said judgment, or any Process or Proceedings thereon or thereto, or anywise touching or concerning the same.*

IN WITNESS WHEREOF, *have hereunto set Hand and Seal the day of , in the year of our Lord one thousand nine hundred and*

SEALED AND DELIVERED IN THE PRESENCE OF US:

ARCHITECTS AND BUILDERS

Building Contracts—Architect's Responsibility—Certificate—Sub-Contractor—Sureties—Mechanics' Liens.

AMONG all the business relations into which men enter there are few more complex than those which are sometimes involved in the construction of a building. For instance, we often see the co-operation of a multitude of contractors, journeymen and dealers in materials, under the supervision of an architect, for the owner of the land on which the building is erected, who is also the employer of the architect. As the law on this subject is of universal interest, we shall direct our attention to a brief analysis thereof.

An architect is one whose business it is to design buildings, fix the thickness of their walls, the supports necessary for the maintenance of them in their proper position, and do all other necessary things in the line of his profession for the guidance of builders in the erection of buildings. An architect may be employed in two different ways to render professional services. He may be hired and given salary payable by day, week, month or year, to perform certain duties, or he may be simply engaged to do a certain piece of work either for a fixed sum, or, as is more usual, for a small percentage on the cost of the construction carried out under his charge. His engagement to render service in either of these ways forms the subject of a contract between him and his employer, and, as it is upon this contract that he must rely for obtaining his compensation, he cannot be too careful to have the terms of the agreement clearly understood by both parties. The nature and purpose of a building contract is to govern the respective rights, duties and liabilities of the builder and his employer, and of an architect so far as he is concerned in the contract between them. The general principles of contract law govern building contracts and our inquiry will be limited to those characteristics applicable to this class of contracts only. In this connection it should be borne in mind that the word builder is used by the courts as synonymous with contractor.

Building Contracts.

Building contracts may be entire or severable, and the character of the building contract in this respect depends upon the

intention of the parties to be gathered from the circumstances of the case. The contract may be said to be entire where the building covered by it is to be completed before compensation may be recovered. This is the case even though the amount to be paid is made up by stating the estimated cost of each stage of the work separately and then adding the same together, as well as where payments are to be made from time to time as the work progresses. A contract is also entire where a right is reserved to the owner to suspend prosecution of work and pay for the building when it has been brought to a certain state of completion.

A contract to build for an entire sum payable on completion, but providing that on failure to complete the owner may do so at the builder's expense, has been held to be a severable contract. In a recent case it was decided that such a contract is severable where it provides for payment of definite sums at different periods before the completion of the entire work.

The contract, whether entire or severable, may be embodied in several instruments. Thus plans and specifications, if made a part of the contract, are essential factors in determining the rights of the parties. Where a contract did not fix the amount of work to be done except by reference to accompanying drawings and specifications, but the drawing and specifications actually annexed to the contract did not fix the amount of work, it was held that a writing, prepared by one party and furnished to the other to estimate and bid thereon, and upon which he made his proposals, which were accepted, which specified within limits the amount of work, was properly admitted in evidence as an accompanying specification.

In order to constitute a valid building contract the language used must be such that it is possible to ascertain to a reasonable degree of certainty the meaning and intention of the parties. Every such contract must contain the elements of mutuality; that is to say, there must be a twofold obligation—the one on the part of the builder to do the work, and the other on the part of his employer to pay therefor. For example, where contractors gave plans and estimates, and the owner agreed to accept the bids, provided certain alterations therein were made, saying that he would make a written contract when he came to the place where the building was to be erected, upon which the contractors agreed to make such alterations at such time, and the owner told the contractors that they might consider that they had the contract, but recommended them not to commence work until he came, as he expected to change the plans, it was held that the correspondence did not constitute a contract.

Written Contracts.

If the contract is to be performed within a year it is not necessary that it be in writing. In consideration of the liability of the human memory to error, and to prevent innocent persons from being imposed upon by people professing to have claims against them founded on long-forgotten conversations, the laws of all civilized countries provide that no court shall recognize or assist in enforcing any agreement for services which are not to be performed within one year from the time of the making of the agreement, unless the agreement or some memorandum of it shall be in writing, signed by the party to be charged, which is the one from whom payment is sought.

Many states by statute require building contracts to be recorded, otherwise they are void and cannot form the basis of a recovery of damages. We will consider this phase of the subject under the title of Mechanics' Liens.

It is very essential that all contracts to build be not in violation of any building regulations. Thus where an ordinance requires that a permit for building must be obtained, an agreement between the builder and owner to construct without obtaining such permit is unlawful and cannot form the basis of a civil action. A contract to build which, though lawful in its inception, becomes by a change in the law unlawful to fulfil, is necessarily at an end and cannot be enforced.

A provision in a building contract has been decided to be valid which prohibits the builder from assigning any money payable under the agreement, unless with the assent of the owner, and which authorizes the owner to notify the builder to discontinue the work under contract. A contract may require the builder to tender the owner a satisfactory bond within a certain time of the execution of the contract. It has been decided that unless a bond was furnished within the time specified in the contract the other party thereto could rescind. But where they have permitted work to be done before the bond is furnished, a reasonable time must be given to furnish the bond required.

A very common way of engaging the services of an architect is through advertisement. A person or public body wishing to build advertises in the newspapers or sends out circulars inviting architects to send in competitive designs and proposing certain inducements, usually in the way of a prospect of an employment for them to do so. Where this is done, every architect who prepares and sends in designs in accordance with the terms of the circular is thereby made a party to a valid contract between himself and the parties issuing the circular or advertisement,

which he can enforce in any court, if the advertiser is responsible for his actions or is authorized to bind anyone else. This last is an important reservation, and hence architects and builders should carefully investigate the committees or public officers who advertise for bids of this kind, and satisfy themselves of the responsibility of the party with whom they deal.

Matters in Dispute.

A stipulation is legal and enforceable by the courts, which provides that the certificate or decision of an architect, engineer or other person referred to shall be final and conclusive, with respect to disputes concerning the meaning or construction of drawings and specifications, or the quantity and quality of the work done, etc. An agreement that an architect or engineer shall determine the fitness of material or the sufficiency of the work is a reference of a matter in dispute to a person fitted by special knowledge to determine the facts, and it is for the benefit of both parties that such facts be settled as the work proceeds, and hence an agreement for such arbitrament will be upheld. A stipulation that the engineers of a railroad company shall make final estimates of the quality, character and value of the work done by a railroad contractor and that such estimates shall be final and conclusive as against the contractor, without further recourse or appeal, has been held to be invalid and cannot deprive the builders of the right to refer to the courts for a redress of wrongs and for the recovery of whatever may be due them. The architect, to the exclusion of the courts, is not vested with authority to determine the questions as to what delay there was in completing the work, and whether it was caused by acts and orders of the owner, or was attributable to the builder, under a provision that changes may be directed by the owner, and that in case of any addition such further time shall be allowed for completion of the work as the architect shall decide to be reasonable, and that any question arising during progress of the work or in settlement of accounts shall be referred to the architect, whose decision shall be binding on both parties.

Provision is frequently made in contracts of the class under consideration that no changes therein shall be made without the consent of the architect or engineer, and that their consent must also be had before the builder can sub-contract his work. Provisions of this character are regarded as reasonable and will be upheld by the courts.

Liability of Builder.

Ordinarily a builder who agrees to work according to the plan and under the direction of an engineer or architect is not

understood to insure the sufficiency of the plan or undertaking as to the scientific correctness of the specifications or the verbal or written directions; and he may stipulate against any liability for the correctness of the plan of the work which he is to execute. On the other hand, he may guarantee the perfection of a plan or the wisdom of directions given under the progress of the work by the architect whose orders he is by the terms of the contract to obey. Since he is bound for his own skill and that of his workmen, as well as for the sufficiency of the material which he supplies, there is nothing unreasonable in a guaranty that the workmanship and the material furnished by him should stand the test of a certain period of time after the completion and acceptance of the work.

A guaranty of the roof of a building for some years against ordinary wear and tear does not dispense with the necessity of the builder completing the roof according to contract, nor does it put the roof in any position different from the rest of the work as to the necessity under another provision of the contract for a certificate that the building is completed according to the satisfaction of the architect.

It is competent for the parties to agree that the employer may retain in his hands money due the builder out of which to meet the demands of material and men, or that money earned by the builder shall be retained until completion of the work to answer any damages suffered by the owner. It has been held that a provision in a building contract that the owner shall hold a certain percentage of the contract price until the completion of the work is for the benefit of the owner and does not render the owner personally liable to a sub-contractor.

Very frequently before a building or construction work of any kind is completed changes become desirable. Care should be taken in the original contract to provide the manner in which modifications or changes may be made, if necessary. Where a portion of a building fell before the whole building was finished and work was suspended because the builder and owner could not agree as to who was at fault, and subsequently one of the builders made a new contract to complete the structure, it was held that the question of doubtful liability was sufficient consideration for the new contract.

It is optional with the builder to rescind the contract where the employer prevents the builder from performing it, or where there is a failure of the employer to pay in accordance with his contract, unless the builder is himself in default.

A contract by advertisement, that is to say, one that is

formed by a proposal or invitation on one side and compliance with its terms on the other, has been decided to be a contract in writing, and, therefore, not subject to the provisions of the Statute of Frauds. Like any other proposal, that made by advertisement or circular may be revoked or modified, provided the revocation or modification is made before it has been accepted by doing work in accordance with it. In all matters of this kind the architect must be sure that the proposal made in the circular letter of invitation is perfectly clear, and that his acceptance of it, by doing work in accordance with it, is no less clear, for the law will not do much to help a man who does not perfectly understand other people's propositions, or who makes his own in a manner not easily comprehended.

It is common, for example, for building committees to incorporate in their circulars of invitation to architects conditions which are incompatible with each other, as, for example, setting a limit of costs in one clause, and in the others demanding an amount of accommodation which cannot possibly be had for anything like the sum named. In such cases architects must at their peril obtain from the committee a vote, saying which provision is the one to be complied with. It is not sufficient to obtain an individual opinion from a single member of the committee, as such an opinion does not bind the committee; all the architects who keep their designs down to the limit of costs are liable to have them rejected because they do not give the accommodations desired, while those who provide the accommodations are equally liable to be thrown out because the execution of their designs will cost too much. In neither case will they have any redress. The committee having obtained all the suggestions and information desired, is free to engage any architect of its own choice.

An Architect's Responsibility.

The present tendency of the law is to separate the responsibility of the architect from that of the builder, making the former liable only for the consequences of what is shown to be lack of ordinary professional skill and care in preparing his plans and specifications or in supervising the work under his charge. Within this limit he is held to a strict accountability. The question of how far the architect is an agent for the owner, and is empowered to bind him by his actions or decisions, is one of extreme importance. The ordinary contract between owners and builders leaves this point somewhat indefinite, and architects frequently get into trouble through not knowing how far they

are entitled to help their employer without his consent. The general rule is that, whatever may be necessary to complete an act which an agent is authorized to perform is included within the authority of the agent. Outside of the duties expressly mentioned in the contract, architects are impliedly authorized to order and to bind the owner to pay for work and materials which may prove to be necessary for securing the safety of the building under unforeseen contingencies, and even in cases where more mature consideration shows that it is necessary, for the same end, to vary from the letter of the original contract.

Architects are required to exercise reasonable care and skill in the performance of their work. They are not bound to possess the utmost skill, such as only a few members of any profession attain, but they must show what other architects consider to be a reasonable degree of professional knowledge and intelligence. So far as local regulations are matters of statute law, the architect is bound to know them; and would be liable to his employer for any damages which might be caused by his neglect or ignorance of them. He is not bound to be familiar with the decisions of inspectors or referees in regard to points left indefinite by the statute. He must, however, use due diligence in seeing that any directions or decisions which may be given in regard to the work with which he is concerned are complied with, and if extra work is necessary for the purpose, and the owner is not at hand to give the necessary orders, the architect not only may but should give them, and the owner will be bound to pay for the work so ordered, while neglect by the architect to take the necessary steps in the case of such an emergency will render him liable for a claim on the part of the owner for damages if subsequent loss should be occasioned by such neglect. An architect must not allow himself to be connected in any way with construction which he knows to be dangerous or even doubtful.

The claim of an architect for compensation for his services depends, both as to the amount which he can collect and the way in which it is to be collected, upon various circumstances. There are two distinct ways in which an architect may be employed. In the first place and by the usual method he agrees to render certain services, consisting commonly in preparing drawings and specifications for the construction of a building and supervising its erection. The owner in return for such services promises to pay him a definite sum, or more commonly a definite percentage on the cost of the structure. By the second method the architect is employed at a fixed salary. In the case of salaried

architects they have an advantage over those working on commission or for a specific sum named in the contract in that they incur no responsibility for the consequences of their own carelessness or unskilfulness. An architect paid by a fixed sum or percentage is liable for damages caused to his employer or to the public by his own negligence or ignorance, or that of his assistants. But an architect or other professional person hired on a salary is taken with all his imperfections, and it is his employers and not himself who must pay the bills for the consequences of any lack of skill or care on his part. These conclusions are based upon the general theory of the law of agency.

Draftsmen in architects' offices frequently work overtime, and the question has occasionally been raised whether they have a legal right to claim extra pay for doing so. The law holds that for extra services, voluntarily performed, the person employed cannot claim extra compensation unless an express agreement has been made beforehand that such extra services shall be paid for. This is the principle laid down in a recent New Jersey case, where a claim was made for additional pay for extra services performed during the illness of the employer, without promise on his part to give additional compensation for them.

Where no stipulation has been made beforehand as to the definite sum or percentage which shall be paid for the architect's service, it is usually supposed by the architect that they are entitled to collect compensation according to the schedule of the American Institute of Architects.

Penalties and Liquidated Damages.

In most building contracts provisions are made in case of default for the payment of damages to the injured party. In this connection the terms "penalty" and "liquidated damages" are frequently used indiscriminately. Whether a sum agreed upon between the parties to be paid in the event of a breach of a building contract is termed by them a penalty or liquidated damages is not controlling upon the question of construction, and there seems to be a leaning of the courts against construing a contract so as to compel the builder to pay the sum mentioned as stipulated damages, and a disposition to regard the sum agreed to be paid as a penalty to enforce performance. The general rule of law is antagonistic to enforcing penalties, and where possible regard the amount stipulated to be paid in the case of

default as liquidated damages. The intention of the parties and the subject-matter and nature of the agreement are to be considered in determining the meaning of the expression, and the question whether the sum is to be treated as liquidated damages or a penalty must, where there is nothing on the face of the contract which will militate against the sum being liquidated damages, depend on the evidence. It may be stated, however, as a general rule of law, that the sum fixed by the parties is deemed to be liquidated damages, and can be recovered as such where the damage and loss which may be presumed to result from non-performance are uncertain and incapable of exact ascertainment, and where the amount named is not on the face of the contract out of all proportion to the probable loss. Where a sum has been stipulated as a payment by the defaulting party which is disproportionate to the probable damage it will be treated as a penalty.

Abandonment of Contracts.

The rules allowing rescission or abandonment of contracts applies to building contracts the same as to other contracts. Thus, contract stipulated that rock taken from a necessary excavation should become the property of the builder except such part as should be necessary for the support and protection of the work. It was decided that the fact that another person through whose property a portion of the structure ran, would not permit the builder to sell rock removed from such portion did not entitle the builder to rescind the contract, as a right to sell the rock did not occur until the contract was completed.

It is optional with the builder to rescind the contract where the employer prevents the builder from performing it, or where there is a failure to pay in accordance with the contract unless the builder himself is in default. A builder is liable to have his contract terminated where he has violated it in any material part, as where he fails to complete it within the time specified or where the material furnished is defective. The right to annul a contract for non-performance by the builder is lost, where the employer is in default by failure to estimate and pay for work done and material furnished by the builder. Furthermore, any misrepresentation or fraud practiced upon either party may be a ground for rescission by the other, provided the fraudulent representation is as to a matter material to the contract and one in the absence of which the contract would not have been made. Likewise where the contract is entered into as to a material matter, the party affected thereby may be relieved in equity

from his obligation. What constitutes fraud, misrepresentation and mistake has previously been considered under the subject of contracts.

A building contract may be mutually rescinded or abandoned. The exercise of a right to rescind a building contract must be signified in an unqualified manner with proper notice to the party to be affected thereby and within a reasonable time. Where, as in one case, the builder did the work required to earn the first instalment on a contract price for building, which was paid to him, and in consequence of a dispute refused to go on with the contract and discontinued working, but afterwards the owner gave the builder a statement agreeing to submit their mutual claims to an arbitrator and agreed with the builder that his execution of the statement should relieve him from further performing the contract, and both the employer and builder signed the statement, the law holds that the employer accepted the abandonment. Where, however, as in another case, the owner notified the builder that he would, at the expiration of a certain time, himself complete the building if the builder did not, and the builder informed the owner that he would proceed as soon as he could obtain certain material and then notified the owner that he could not secure the material, but that he would send some men to finish the building if the owner could get the material elsewhere, the law regarded the builder as liable for the proper construction of the building and construed the circumstances of this case as not constituting any assent to an abandonment of the contract.

An architect's contract with the owner, unless some expressed stipulation is made to the contrary, is a personal one. The performance of the contract involves the personal skill and judgment of the architect himself, and cannot be undertaken for him by any assignee in case of his bankruptcy, or by his executors or administrators in case of his death. The contract cannot be assigned by the architect to anyone else without the owner's consent. It is a well-settled rule of law in case of an entire contract for a certain amount of goods or services, that no part of the price is due unless the whole of the goods is delivered or the entire service rendered. As an architect's contract with an owner is held to be an entire one, his family, in case of his death or disability, would be unable to collect any compensation for what he had done on unfinished buildings, were it not for a special exception which is made by statute in most of the states, to the effect that where full performance of contracts for per-

sonal services is prevented by death during the term of the service, the personal representative of the deceased is entitled to recover ratable compensation for services actually rendered.

The architect's certificate, which is the document in accordance with which the accounts are closed, is issued after all the work is done, all the extra work noted, and if extras are allowed a reasonable price is fixed therefor. It is usual to pay the builder instalments of the contract price as his work goes on, in accordance with interim or provisional certificates given by the architect, and as it is impossible to judge as accurately of the value of work partly done as it is of a completed job under a contract, and as a large reserve is usually made from the total amount earned by the contractor, to serve as a margin to cover contingencies until the completion of the contract, the architect is commonly allowed a certain liberty in estimating the provisional amounts due. He must, however, be careful not to over estimate them or he may, if the builder should suddenly abandon his contract, be compelled to pay out of his own pocket the difference between what he ought to have certified and the amount which the builder has obtained.

After a certificate is given, the architect cannot recall it, unless he discovers that there was some mistake in it. An architect once gave a final certificate and afterward wrote a letter, in which he said that the certificate was not intended as a final decision upon any just rebate or offsets. The court held that it was nevertheless conclusive. Of course there may be circumstances in which a different decision would be given. For example, in a certain recent case a church was built from plans made by a certain architect, but the erection was superintended by an assistant. With the tacit assent of the church authorities and of the architect, certificates for interim payments were given by the local superintendent and payments were made on them, although the contract provided that certificates were to be given by the architect. When the church was finished, the architect, who had not visited it before, refused to give a final certificate, although the local superintendent was willing to do so. It was held on a suit by the contractor for his pay, that the opinion of the architect was under the circumstances immaterial, as the local superintendent had been accepted in his place.

Where the contract so provides, the certificate of the architect is just as binding on the owner as on the builder. Where work is supervised by a firm of architects, it has been held that the signature of one of the partners to a certificate, without objection from the other, is sufficient.

Where extra work is done under a contract, it is often claimed by builders that the provisions of the contract as to the production of a certificate, as well as the other conditions of payment, apply only to the work done under the original agreement and not to the extra work. This idea is entirely erroneous. The courts uniformly hold that the contract conditions, in this class of contracts, cover both the original and the extra work, except in case of changes so extensive that the work included in the original agreement can no longer be traced, and there are several decisions to the effect that the requirements of a contract as to certificates apply equally to work detailed in the specifications and to extra work for alterations.

The refusal of an architect to give a certificate of performance must be based on and supported by some real and substantial failure on the part of the builder to fulfil his duties under the contract, and such failure should be pointed out and protested against by the architect, and it must appear that the work was not performed as provided in the contract, and that the builder was not really entitled to the certificate. To constitute a certificate a final one, it is not essential that it be declared to be such, but if in balance or satisfaction of all claims it is sufficient.

Where the building contract expressly provides that the certificate of an architect shall be final and conclusive, it is a well-settled rule of law that such certificate is conclusive and binding in its legal operation and effect upon the owner, the builder and all other parties to the contract, including the sureties. A clause providing that if any differences should arise between the parties in relation to the contract or the work to be performed under it, the decision of the architect should be final, does not render binding a decision on the claim of the owner for a bill for merchandise sold to the builders, as such claim was entirely outside of the contract. So a clause, providing that the decision of the architect shall be final and binding in case the parties fail to agree as to the value of extra or deducted work, or the amount of extra time, or in case of any disagreement between the parties relating to the performance of any covenant or agreement contained in the contract, does not cover a claim made by the builder for the recovery of damages resulting from a delay caused by the failure of other contractors to complete the work.

The only grounds upon which an architect's certificate may be impeached are fraud and such gross mistakes as would imply bad faith or a failure to exercise an honest judgment.

Architect's Duty Toward Builder.

In his relations to the builder, the architect, although employed by the owner, is bound to act fairly. However strict he may be in holding the builder to his contract, he must not try to over-reach him or enter into any secret arrangement with the owner to deprive him of any part of the money justly due him. In all cases the architect is presumed to be an impartial man of science, and the contract between the owner and the builder usually makes him the final referee in matters relating to the construction of the building and the regulation of the accounts. If it can be shown that he has a personal interest in distorting the facts in favor of either party, his award loses its validity and both parties are absolved from accepting it. It occasionally happens that delays occur in building due to the fault or neglect of the architect, and in this case the architect must see that he does not try to push off the burden of responsibility for them from his own shoulders on those of the builder. The architect, if he had caused delay by neglect to furnish drawings when the builder needed and asked for them, would not be allowed to use his position as final arbitrator in matters relating to the contract, to impose penalties upon the builder for the delay caused by his own neglect. It is the duty of the architect to show diligence and care, as well as perfect honesty, in adjusting the accounts between the owner and the builder, failing which he becomes legally liable.

Conversely, the builder owes certain duties to both the architect and owner, which we will briefly outline. The first duty is to furnish the bond required by the contract. It is a further duty of the builder to comply with all building regulations, because a builder cannot recover under a contract where he has failed to comply with all building regulations. Where the contract requires a builder to obtain a permit from the Building Department of the city, he must file plans free from objections and acceptable to the department, as their filing is a prerequisite to the granting of a permit. In many states a permit will only be issued upon the personal application of the owner. If a contract has been awarded to a builder and the owner fails to obtain a permit the builder may recover damages.

The builder is not bound to insure the building he is constructing until its completion, unless the contract so provides. A builder who has agreed to erect a building on the land of another has no right to interfere with the latter's possession any more than is necessary to carry out his contract, and he cannot after his work is completed retain possession as against

the owner, with a view of enforcing payment of the price, or dispossess the owner. He is only entitled to have such possession of the building given to him as is required for the purpose of labor thereon. It is a practical matter of importance to bear in mind that where an owner of land on which buildings are standing contracts for the erection of new buildings thereon, the builder, on taking possession under the contract, has a right to the material of the old building, except, of course, where there is some express provision in the contract to the contrary. A contract to excavate land, however, for the erection of a building thereon does not imply that the title to valuable minerals removed in performing the contract is transferred to the builder.

A builder's right to exercise his own judgment with respect to what the specifications and plans require for its fulfilment is subordinated to that of an architect who is authorized to determine their meaning. A builder is not entitled to recover for work as an extra, where it is included in the contract but not mentioned in the specifications referred to in the contract. Where signed specifications provided that the finishing of certain work should be made of freshly burnt shell lime and thoroughly washed coarse white marble dust, but the plans and specifications submitted to the contractors, and on which they bid, called for a plain cement exterior coat, without the white finish, the builders were held bound to the specifications signed. The courts have even gone so far as to hold that a builder was not liable to furnish elevator gates under a contract calling for a combination passenger and freight elevator, without more particular specifications.

A builder carrying on an independent employment and acting in pursuance of a contract with his employer, by which he has agreed to work at specified times in a particular manner and for a stipulated price, is alone liable for injuries to third parties that occur while the work is progressing and which are caused by his negligence. For negligence of the builder not done under the contract, but in violation of it, the employer is not liable; the relationship of master and servant not subsisting between the parties, but only that of contractor and contractee, and the power of directing and controlling the work being parted with by the employer and given to the builder. But, on the other hand, if the builder is employed generally, and the work is to be performed for a stipulated price, the employer remains liable because he retains the right and power of directing and controlling the manner and time of executing the work. The builder is not liable for injuries to trespassers on the building. The owner is responsible to persons injured by a builder while

employed in doing work which in the progress of its execution exposes others to unusual peril. The owner is also liable for the negligence of a builder where such negligence creates a nuisance and where an incompetent and untrustworthy builder is employed. After completion and acceptance of a building the liability of a builder for accidents caused by defective construction ceases and the liability attaches to the owner, whether the damage is attributable to his own negligence or to that of the builder. It must be remembered, however, that the builder is responsible to the owner for defective performance of his contract. In this connection it should be further borne in mind that where the builder performs his work strictly in conformity with the plans and specifications, he is not liable for defects in the work that are due to faulty structural requirements contained in such plans and specifications. If the builder departs from his working contract without obtaining consent to do so, he becomes a guarantor of the strength and safety of the building.

The courts have held that a builder is not liable for the cracking of walls caused by the unfitness of the soil to sustain them, when the employer refused to have the foundation of the wall made sufficiently deep and broad.

An owner who has paid for all the work that has been done on the contract may immediately, upon a default of the builder to complete, take possession of the unfinished building; and, if he pleases, employ another person to do what the builder had been engaged to do and had refused to do. This right is not affected because the contract provides that the owner may complete the building; but, where the owner fails to avail himself of a provision to that effect, work done thereafter is done under the contract. When the contract provides that if the builder fails to complete the building as agreed the owner may do so, and deduct the expense from the contract price, the contractor cannot abandon the work and compel the owner to complete it and account to him for the balance of the contract price.

Compensation of Sub-Contractors.

As a general rule of law the builder and not the owner is the person liable for services performed by a person under a contract with the builder and for materials furnished; and sub-contractors and material men must look for payment to the former. Where a building is destroyed by fire while in course of erection, a settlement between the owner and the contractor by which the latter is paid for the work as far as done entitles a sub-contractor to be paid by the contractor for work actually done by him, not-

withstanding some things of minor importance may not have been performed in accordance with the sub-contract, since such failure was waived in the adjustment between the original contractor and the owner.

Although a contract with a private individual is a very informal affair, and almost anything will be regarded as a proper signature which shows the intentions of the parties, it is very different where a corporation is one of the parties to the agreement. While a private individual may enter into any sort of contract that he chooses, and will be held to the fulfilment of any promise in consideration of which he has received benefit from another, the powers of corporations are strictly limited either by their charters or by statute, and they cannot be compelled to carry out promises made by their officers beyond the bounds of their authority, no matter what may be the hardships inflicted upon the persons who have incautiously trusted them.

In the United States the contracts of corporations signed by the proper officers and made in accordance with the statutes or charters regulating the affairs of the corporations may be considered as valid, even though the corporate seal is not attached as part of the signature to the contract. However, it is very necessary that the contract should be within the authority of the corporation and of the officers who claim to represent it, and our courts hold that it is the duty of the person who wishes to make a contract with a corporation to inform himself on this point. If he fails to do so the corporation cannot be held liable for losses which he may suffer in carrying out an agreement entered into without proper authority. Architects and builders cannot be too careful to see that corporations, public and private, have proper authority to execute the contracts entered into with them if they wish to be sure of getting their pay for what they do.

Not only can nothing be recovered on a contract illegally made with the representatives of a public body even if the work is entirely performed, but the agreement, where it is within the legal authority of the officials who make it, must be made with due formality or it will not be binding on the corporation which they represent. It has been held that an agreement made by county commissioners not at a regular meeting of the board, but in vacation, was not binding on the county, and where the individual members had separately signified their assent this was held to be insufficient.

In certain other respects the rights of a contractor against a corporation are much more restricted than they are against a private individual. For example, no mechanic's lien can be

maintained for work on a public building, such as a public schoolhouse, jail, etc., and the property of corporations other than towns, counties or states, where used for the public service, as in the case of railway stations, ferry houses and similar structures is exempt from mechanics' liens.

Many corporations are formed for the purpose of evading liability on the part of the men who practically own and manage them, and who, by placing most of the stock in the hands of irresponsible dependents, can, without risking their own property, pile up debts against the corporation which can never be collected for lack of corporate assets with which to pay them; and even where a corporation is formed and managed in good faith, the directors have no right out of a mere sentiment of honor to pay away the stockholders' money to persons who have no legal claim to it. The old familiar adage, "a stitch in time saves nine," applies with particular force to architects and builders who enter into contracts with corporations of any description.

Some Important Decisions.

In connection with the right of sub-contractors to compensation, briefly touched upon previously, a few important decisions will be valuable to bear in mind. It has been held that a provision made by a contractor in a contract between him and a sub-contractor that he shall be entitled to retain in his hands a part of the earnings as a protection against his liability to the persons employed by the sub-contractors, will not give to the latter or his assignee any right of action against the contractor personally or any lien on the fund itself. An owner who says to a material man, who has already furnished materials to the contractor, that he will pay for all the materials that the contractor might get for the building, is liable, on his promise, for all materials furnished thereafter for the building and charged to him; but is not liable for such material as had before the promise been furnished to the contractor, unless the promise to pay for past deliveries is the consideration inducing future deliveries.

A sub-contractor may resort to an owner to the extent of any money paid away to his damage after the owner has accepted an order from the builder in favor of the sub-contractor agreeing to deduct the amount of the sub-contractor's claim out of payments due the contractor on completion of the building. An order or draft, if accepted by the owner, amounts to an assignment of the fund due under the building contract; and a subsequent assignment from the contractor to a third person for his

rights under the contract does not affect the rights thus acquired under said order. Where the owner of a house in process of building accepted an order drawn upon him by the builder in favor of a third person, to be paid when the house was finished, and neither the builder nor the owner finished the house, but it was sold by the latter in an unfinished state and afterward completed by the purchaser, the third party doing some work upon it was entitled to recover from the owner. The fact that a contract provided that the owner should retain fifteen per cent of each partial estimate, made as the work progressed, to insure him that all claims for labor and material would be paid by the contractor, and that the building should be completed in accordance with the contract, gives a sub-contractor no right of action or claim against the owner for money so retained, though from estimates based on labor and material furnished by him. Persons who have advanced money to the builder with the expectations that it will be used in carrying out the building contract cannot, where some of it has been paid to laborers and material men, demand that an owner's right to withhold the funds only in case of non-payment of laborers or material men be exercised in their favor.

Rights and Liabilities of Sureties.

Sureties are bound only in the manner and to the extent provided in the obligation of the bond, and its terms cannot be changed without their consent, even with a view to avoid ultimate liability. Thus, if payments are made to the builder in excess of the amounts due on the estimates, they will not be liable for the excess and payment to the builder without the surety's consent of a percentage that should, under the building contract, be reserved until completion of the work for which a bond was given discharges the surety.

Where the retention moneys have been paid over and thereby the position of the sureties has been altered, but such change in position has been effected by fraudulent execution of the work, the honest execution of which the sureties have guaranteed, the sureties are not discharged, it being a principle of the law of suretyship that a surety cannot claim to be discharged upon the ground that his position has been altered by the conduct of the person with whom he has contracted, where that conduct has been caused by a fraudulent act or commission, against which the surety, by the contract of suretyship, has guaranteed the person with whom he has contracted.

On the default of the builder, in cases where the contract

requires him to pay for all labor and material furnished, a right of action directly against the sureties accrues to unpaid laborers, material men and sub-contractors. However, in the absence of this provision the sureties are not liable, unless they have completed the building on his default, and under an agreement with him collected the price from the owner.

Sureties on a bond conditioned for building in accordance with plans are released by a substantial change in the plans, if the changes are made without their consent. Changes and alterations made by the owner will not release the sureties where the contract permits him at any time during progress of building operations to make alterations, changes, or additions without invalidating the contract, or where the bond itself contains a similar provision.

A surety is not discharged from his obligation because a building contract, plans and specifications, or the bond itself, have not been filed or recorded as required by statute.

A builder may recover for all damages occasioned him by the owner's or employer's breach of the contract. Thus he may recover not merely the sum he may have paid his sub-contractors, but for losses caused by his having been compelled to do the work in an unusual and more expensive manner, or in more inclement weather, and for all elements of loss proximately affecting him. Interest on capital invested by the builder for material and on money due to him should be allowed in estimating his damages, notwithstanding the amount he seeks to recover may be reduced because he has deviated from the terms of his contract, but interest will not be allowed on his profits until they are determined by the verdict.

Mechanics' Liens.

Closely allied to the subject of architects' and builders' contracts is that of mechanics' liens, and as the law regulating the rights of mechanics and material men affects such a vast number of people, we will direct our attention to a brief analysis of this subject. The law of mechanics' liens is more or less technical, and being the result of statutory enactment, varies in the different states.

A mechanics' lien is a lien created by statute which exists in favor of persons who have performed work or furnished materials in and for the erection of a building. The lien is given to secure priority of payment of the price and value of work performed and the materials furnished, and springs out of the appropriation *and use by the landowner of the mechanic's labor*

and the materials furnished. It rests upon the broad ground of natural equity and commerical necessity. Without the existence of the mechanics' lien laws, the judgment creditors of the owner of property might levy upon and sell the new or improved property before the builder could secure a judgment for his claim, with the effect that the latter might be unable to secure compensation for the services he may have furnished or the money he may have expended. It is evident that without some such protection, building operations would be incalculably hampered. While such liens are now looked upon merely as a special protection to building contractors, they were originally proposed as a means of enabling a poor man to secure a contractor to undertake the building of his home.

The law regulating mechanics' liens has been codified in most states, and differs only in minor details.

A mechanics' lien is of an arbitrary character. It attaches at once and is binding upon the property from a designated event for a specified period of time, and it may be further continued by simply filing at or before the expiration of that period, in the office of the prothonotary of the proper county, a claim.

In the first place, every mechanics' lien is based upon a debt contracted for work done or materials furnished for or about the erection and construction or alteration and repair of buildings. A mere naked, unexecuted contract would not be sufficient in itself to support a lien, as there is required in addition a performance of the work or a delivery of the articles for which compensation is claimed. This work must have been done, or the materials furnished, not upon the credit of a contracting party, but of the thing erected or repaired. The contract need not necessarily be in writing, but may be entirely oral.

It sometimes happens that an agreement is made between the owner and contractor wherein the contractor waives the privilege of filing a lien for labor or materials furnished. Inasmuch as sub-contractors likewise have the privilege of filing a lien, as we shall show later, it is manifest that such an agreement to waive the right to file a lien would not be fairly binding upon such sub-contractors as had no knowledge of such agreement to waive. A provision in a contract between the owner and contractor that no mechanics' lien shall be filed, to bind a sub-contractor, requires that actual notice of such agreement shall be given to him before any labor or materials are performed or furnished by him. If such a contract is filed in the office of the prothonotary of the court for the county in which the building

operation is located, prior to the commencement of the work upon the ground, or within ten days prior to the contract with the claimant, the same will be regarded as constructive notice to the sub-contractor and hence binding upon him.

In order to establish a mechanics' lien it is usually necessary that the materials furnished or labor performed should have gone into something which has attached to and become a part of the realty, and has added substantially to the value thereof. A lien cannot attach to one piece of property for labor performed on other property, although it be contiguous. The fact, however, that a building on which a lien is claimed extends over the line of the land described in the petition will not defeat the lien on that part of the building standing on the land described, for the value of the labor thereon, if this can be ascertained.

As a general principle of law, a mechanics' lien attaches to the building or other improvement constructed, and the interest of the owner in the land upon which it is situated, whether such interest be a fee simple, an estate for life, or any less estate than a fee. The lien extends to any interest in land that is legally subject to mortgage.

A mechanics' lien can attach to equitable as well as legal estates in land. Thus the interest of one who being in possession of land under a contract of purchase, erects a building or other improvements thereon, is subject to the lien. But a mechanics' lien cannot attach to the equitable lien of a vendor for the purchase money when he has conveyed the whole title. A mechanics' lien will likewise attach to the interest of a lessee, whether he has an estate for years or is merely a tenant from month to month. In order, therefore, to create a mechanics' lien of any value as to the ground built upon, the party in possession at the time the structure is commenced, and at whose instance it is erected, must have some estate in the land to the extent of which it may be bound, though that estate be of the most remote character.

The present law is to the effect that an owner of land in possession at the time a building is begun, and at whose instance it is erected, may subject his estate therein to a lien for a debt contracted for work done or material furnished for such erection, and this, notwithstanding the claimant may be one who dealt with him under a special contract.

Right to a Lien.

In order to establish a mechanics' lien it is usually necessary that the materials furnished or labor performed should have gone into something which has attached to and become a part

of the realty, and has added substantially to the value thereof. A lien cannot attach to one piece of property for labor performed on other properties. In the construction of statutes giving a lien for the erection and construction of buildings the controlling element in deciding whether or not a lien can exist appears to be whether or not a new building has been put up. Whether or not the lien can be obtained in a particular case must depend upon the facts. A building may be greatly changed in structure without losing its identity; it may, on the other hand, be so entirely changed in plan and general appearance as to become in a fair sense a new building, although some portions of the old materials may remain in it. Merely adding a basement is not an erection or construction, nor is the adding of a bath house, and where an old house whose walls are standing is repaired there is no lien therefor as against a new structure.

Statutes have extended mechanics' liens to include repairs, alterations and improvements.

In this connection the law in the matter of repairs is virtually the same as the law in the matter of new erections.

Persons Entitled to a Lien.

Not only the persons contracting directly with the owner or his agent may acquire a lien, but likewise certain sub-contractors. A contractor is one who, by contract or agreement, express or implied, with the owner, or one who acts for the owner, plans or superintends the structure or other improvement or any part thereof; or furnishes labor, skill or superintendence thereto; or supplies or hauls materials, reasonably necessary for and actually used therein, or any or all of them. A sub-contractor, as we pointed out previously, is one who, by contract or agreement, express or implied, with the contractor, or with one who acts for him, undertakes to do certain of the things enumerated in the definition of a contractor, above given. It will thus be seen that a lien may be filed by either the person contracting directly with the owner or by the person contracting with the contractor. The question which naturally might arise is whether the sub-contractor of the sub-contractor, and so on indefinitely, may file a lien for labor or material furnished, which question we will consider a little later.

It should be borne in mind in discussing this subject that personal property which is so attached to real estate as to become a part of such real estate is usually held to be within the machanics' lien laws. Accordingly, lien laws have been held to extend to stage fittings and scenery, theater seats or chairs, store shelves

placed so as to conform to the building and nailed to the wall, window and door screens, manufactured for and fitted to a building, wires and insulators in an electric lighting plant, mirrors set in a wall, and a large tank upon a foundation expressly built for it. However, lien laws, as a general rule, do not cover trade fixtures, such as tables placed in a store building, but not attached, temporary partitions, etc.

Whether or not machinery is within the lien laws usually depends upon whether it becomes a fixture. If it is stationary and firmly attached to the realty, so as to become a part thereof, it is the subject of a lien, otherwise not.

The statutes in most states give a lien only for work or labor performed on, or material furnished for, the building or other improvement, and a lien can be acquired only where there is something due to the claimant, and the claim to be secured and enforced is such as the statute contemplated. When a round price is to be paid for labor and materials for a part of which the law gives a lien, and for another part of which there can be no lien, and there is no way of determining how much is of one kind and how much of the other, no lien can be enforced for either. This principle of law should be carefully borne in mind in making a contract to perform labor or furnish materials in the construction or improvement of a building.

The persons entitled to a lien are: Any contractor, architect or builder and any sub-contractor contributing work or work and materials upon the credit of the building and in compliance with a contract to erect; any workman contributing work at the request of an owner or contractor, toward the erection and upon the credit of the building; and any material man furnishing materials at the request of an owner or a contractor to erect, dealing immediately with an owner. An architect or builder who directs and oversees the execution of the work, does work about the erection of the building within the intendment of the law, and is entitled to a lien for his labor. But where a mere architect confines his work to preparing the plans and writing out the specifications, doing nothing further, he is not entitled to a lien.

The right to a lien for materials furnished extends to all such materials as ordinarily enters into or are used in the construction, repair or improvement of buildings. Whatever may be the condition of material furnished in the construction of the building, whether they are very rough or perfectly adapted for their purposes, and in whatever quantities, or from whomsoever they may have been originally purchased, or although kept by the contractor as merchandise, his lien is not affected by these

considerations, provided only the materials are included in the work contracted for.

It has been held that a mechanics' lien for materials may attach, although they were furnished at a place other than where the building or other improvements was erected or made, and even though the place of furnishing the material is without the state. It is laid down, however, as the general rule that the lien attaches only for materials actually used in the construction of the building. A lien may be allowed where materials have been prepared or furnished as ordered and the owner refuses to accept or use them. It is sufficient in most states that the material be furnished on the credit of the building for use therein, and it is immaterial as between owner and furnisher whether they are used or not.

There can be no mechanics' lien for money lent or advanced to a contractor or other person for the purpose of enabling him to purchase material for or pay for labor upon a building or improvement.

Under the title of workmen are classed such as are neither contractors nor sub-contractors. But such master workmen or inferior contractors as contract with the owner or a contractor to furnish special work toward the erection or repair of the building, as, for example, to manufacture all the moldings, door and shutters, are not regarded as coming within the legal definition. Mere subordinates or journeymen, however, are not included within this class of claimants and have no lien.

It is usually held that where the contract is for a building generally, extras subsequently ordered will be covered by the lien, at any rate if provision is made in the contract with regard to extras, thereby showing that they were contemplated. There is no lien for damages sustained by the contractor by reason of a breach of contract by the owner, or damages of protest on an acceptance given for work and labor. Neither is a sub-contractor entitled to a lien for damages and expenses incurred through idleness, nor on account of work made necessary by the default or negligence of the principal contractor nor for breach of contract on his part. It must always be borne in mind that the lien is intended to merely cover the actual work done and materials furnished on the credit of the building constructed or improvement made thereon.

It is usually held that where a lease contains a provision authorizing the lessee to make repairs or improvements at the cost of the lessor, either generally or by deducting the cost from the rent, or where part of the consideration for the lease is the

making by the lessee of improvements which become a part of the realty, or that improvements made by the lessee shall revert to the lessor, a mechanics' lien may attach to the property for work done or materials furnished pursuant to a contract with the lessee. And it has even been held that a mere provision in the lease authorizing the lessee to make improvements at his own expense shows such consent of the lessor as will authorize a lien on the property. But where, although the terms of the lease require the lessee to erect a building on the property, it is also provided that such building shall be the property of the lessee, removable at the expiration of the lease, no lien on the lessor's interest arises out of the erection of such building.

It will be remembered from what has been stated above that a contractor, whether for the entire construction or only for some primary part of a building, may confer on those with whom he contracts to do parts of the work embraced in his contract the right to liens on the building. But, on the other hand, a person contracting with a material man who has the contract to furnish the material for a building may not have a lien. An architect cannot file a lien for work done by him under a contract with the contractor, although he may for work done by him under contract with the owner. The contractor who plans or superintends the erection of a structure, or furnishes the labor therefor, is not in the eyes of the law a mere workman, but rather an agent for the owner, and thus, representing him, has power by contract to subject the building to a lien for work or labor procured by him.

As a general rule, where a husband contracts in his own name for a building or improvement on land which is owned by his wife, a mechanics' lien cannot be obtained. But the property may, however, be subjected to a lien where the husband in making the contract acted as her agent or representative, or where she has held out her husband as her agent. Nevertheless, in order to charge the wife's land under a contract made by her husband, it must clearly appear that she authorized him to act for her, and no authority from the wife to the husband will be inferred from the mere existence of the marital relation.

Whether a mechanics' lien attaches under a building contract depends at the outset upon the nature of the contract and not upon that which is done under it. A contractor must show that his contract brings him within the terms of the law or he cannot have a lien. The contract pursuant to which the labor is done or the materials are furnished must be one that can be enforced in an action at law. It must rest upon a valid consideration, and be sufficiently definite to enable the amount to

become due under it to be determined with reasonable accuracy and precision. Where a contractor is doing business under a trade name other than his own, a contract made with him in such name shows that he is the real party in interest and entitled to a lien. The consent of the owner to the improvements for which the lien is claimed must be absolute and not clogged with conditions.

Too much care cannot be exercised on the part of contractors and mechanics as well as material men in looking up the title to the land, and in seeing that their agreements are in proper shape, as a little precaution in this regard frequently saves unnecessary time, trouble and expense.

Every structure or other improvement shall be subject to a lien for the payment of all debts due the contractor or sub-contractor in the erection and construction and removal thereof, in the addition thereto and in the alteration and repair thereof, and of the out-houses, sidewalks, yards, fences, walls or other enclosure belonging to said structure or other improvement; and in the fitting up or equipment of the same for the purpose for which the improvement is made, including paperhanging, grates, furnaces, heaters, boilers, engines, chandeliers, brackets, gas and electric pipes, wires and fixtures. Also for like debts contracted by such owner in the fitting up or equipment with machinery, gearing, boilers, engines, cars or other useful appliances, of new or old structures or other improvements, for business purposes, and for like debts contracted by such owner for rails, ties, pipes, poles and wires, and the excavations for and laying and relaying, stringing and restringing said rails, pipes or wires.

While a contractor or sub-contractor whose contract includes the putting in of chandeliers, the building of fences, etc., will have a lien under the present law, such would not be the case where alterations or repairs of this kind are made, under separate contract, the price for which being under the statutory amount.

It is important in the present connection to distinguish between what constitutes new structures and alterations. The term erection or structure as used in the law of mechanics' liens is, of course, applied in the first place to an entirely new building. A rebuilding of an old erection upon a different scale, and a changing of it as to the exterior into a new structure, is treated as such a construction as may subject the property to a mechanics' lien, for work done or materials furnished for or about the erection of a building.

A substantial addition to a structure or other improvement shall be treated as a new erection or construction thereof, and

every adaptation of an old structure or other improvement to a new or distinct use, and which effects a material change in the interior or exterior thereof, shall also be deemed an erection or construction. Under the law at present in force a mechanics' lien may be had for the removal or demolition of a structure as well as for the building or alteration thereof.

Where a building is unfinished by reason of the negligence or interference of the owner, the contractor or sub-contractor may have a lien for the amount of the work actually done. It should be carefully borne in mind that no lien can be had where the building before acceptance by the owner is destroyed by fire or other casualty.

No claim of a sub-contractor is valid for alterations or repairs unless written notice of an intention to file a claim therefor, if the amount due be not paid, shall have been given to the owner on or before the day the claimant completed his work or furnished the last of his materials.

We will purposely omit in the discussion of this subject the requisites of notice and claim in perfecting a mechanics' lien, as they are technical and involve rules of procedure. It is our object to emphasize the rights and remedies provided by law for the benefit of mechanics, but the methods by which such remedies are to be obtained must be most strictly followed out, and in case of a necessity for filing a mechanics' lien an attorney should be consulted.

Operation and Effect of Lien.

As a general rule a mechanics' lien can be enforced for the full amount due and unpaid for the work and materials furnished. The recovery in an action to enforce the lien is limited to the amount claimed in the notice, claim or statement filed pursuant to statute, with interest. Thus, where a sub-contractor's lien notice does not cover labor to be performed or materials to be furnished, he is not entitled to a lien for what was done or furnished, after filing the notice. In the case of a sub-contractor or material man claiming under the contract with the contractor, the claimant is entitled to enforce a lien up to the amount fixed by such contract, although the contract price includes a profit over the value of the labor or materials furnished. Under the law in Pennsylvania a limitation is placed upon the above rule to the effect that a person other than the original contractor cannot enforce a lien for more than the reasonable value of the work done or materials furnished.

The lien may include interest on the amount of the claim

from the time it became due, but where it is sought to enforce a lien for the reasonable value of what was done and furnished, and the precise amount due is neither fixed nor ascertainable by mere mathematical calculation, the demand, not being liquidated, does not draw interest.

There is respectable authority which supports the view that the right to a lien accrues when the claimant has completed the work or furnished the materials and that the lien attaches to the property at the time when the contract is made or recorded. However, the general rule of law is that the right to a lien accrues at the time of the commencement of the work or the furnishing of materials out of which the lien arises, or the commencement of a building or improvements for work done or materials furnished for the construction of which the lien is claimed. When the plan of a building is changed and greatly enlarged while in course of construction, the liens of mechanics and material men subsequent to such change relate only to the commencement of the alteration on the ground, and are subject to all liens which had then fastened on the land.

In view of the above-stated rule it becomes important to determine what constitutes the commencement of a building or improvement which regulates the right of a mechanic and material man to file a lien. The commencement of a building or improvement within the meaning of the lien law is the visible commencement of actual operations on the ground for the erection of a building; the doing of some work or labor on the ground, such as beginning to excavate for the foundation, walling the cellar or work of a like description, which everyone can readily see and recognize as the commencement of a building, and which is done with the intention and purpose then formed to continue the work until the completion of a building. But work which is merely preparatory to building operations at some future time, and does not of itself tend to contribute directly to the erection, such as clearing, leveling, filling up or fencing the property, does not constitute a commencement for the purpose of fixing the time to which the lien relates.

A temporary cessation of work, where the design of building is not abandoned, and work is subsequently resumed and prosecuted without any substantial change in the design, will not prevent the relation back of liens to the time of the original commencement. However, where the project is abandoned and work is afterward resumed under a new contract between different parties, a mechanics' lien cannot relate back to the time when the building was originally commenced, but relates back only to the time of the recommencement.

What the Lien Binds.

No personal liability on the part of a defendant is created by the filing of a statement of claim under the mechanics' lien system and the taking of steps to recover thereon; the sole object is to secure the compensation of the claimant, by a lien binding the premises for the improvement of which he has expended labor or furnished material; when this source is exhausted, the law has fulfilled its part, and the mechanic or material man who is not fully satisfied must seek redress through some other channel. The question of importance which next presents itself is what the lien binds, whether only the structure erected, without the ground, or both? The lien ordinarily extends to the ground covered by the building, and to so much other ground immediately adjacent thereto, and belonging in like manner to the same owner, as may be necessary for the ordinary and usual purposes of the structure. In fact, the general rule extends the lien to the building and so much of the land upon which it is situated as is necessary to its convenient use and occupation, and ordinarily covers the entire lot, tract or parcel upon which the building or improvement is situated. Land outside of these limits is not subject to the lien, but the parties may by contract extend the area of property to be covered by the lien beyond what would be subject thereto under the statutes.

If the person by whom the contract for the building or improvement was made was not then the owner or the absolute owner, but subsequently becomes the absolute owner or acquired a larger interest than he formerly had, the lien attaches to the subsequently-acquired interest. Where the property subject to the lien has been sold and converted into money, the court will follow the fund into the hands of the person who converted the property into money and have the lien satisfied out of such funds.

Priorities of Liens.

All mechanics' liens on the same property and arising out of the erection of the same building and improvement stand on an equality and share equally in the amount realized if it be not sufficient to pay all in full, regardless of whether the claims are for labor or for materials, or of the times when the several claimants entered into their contracts for what they did or furnished.

Mechanics' claims shall be paid out of the proceeds of a judicial sale of the property described therein, in preference to any estate, charge or lien of which the claimant had not actual

or constructive notice at that time, except municipal or tax claims and the exemption allowed by law. In the case of a claim for a new structure, an estate, charge or lien, of which the claimant had actual or constructive notice before the date of visible commencement upon the ground, if given to secure advancement of money, knowingly to be furnished for the purpose of making the improvement in whole or in part, shall have with prior liens and encumbrances, a preferential claim upon the funds raised by a judicial sale of said property to the extent only of the actual value of the property immediately prior to such visible commencement of the work; but the proceeds of such sale, above such value, shall be applied to the payment of the mechanics' claim in preference to such estate, charge or lien. The lien of every such claim shall bind only the interest of the party named as owner of the property at the time of the contract or subsequently acquired by him.

Where the property is subject to a mortgage or other encumbrance at the time when the building is commenced, such lien is entitled to priority over any mechanics' lien arising out of the improvement of the property. Mechanics' liens are entitled to priority over all subsequent liens and encumbrances attaching to the property after the commencement of the building or of the work of furnishing of materials out of which the lien arises. A mortgage given to secure future advances has priority over mechanics' liens subsequently arising to the extent of the full amount advanced, including what is advanced after, as well as before, the accrual of the mechanics' liens. In New Jersey it is well settled that purchase money mortgages, including amounts to be advanced by the vendor, are entitled to priority over mechanics' liens to the extent of the money actually advanced pursuant thereto, provided the mortgage is recorded or registered before any lien claim is filed.

A mechanics' lien attaching to property when it comes into the mortgagor's hands is superior to a mortgage executed previously and covering that property as after-acquired property; but a mechanics' lien for improvements made on the property after the title was acquired by the mortgagor is inferior to a mortgage executed before title was acquired, but covering the property as after-acquired property.

Where the holder of a mortgage which is prior to a mechanics' lien becomes the purchaser of the property at a tax sale, it has been held that such purchase extinguishes the mortgage debt, and the mechanics' lien remains the only lien upon the property in the hands of the purchaser.

All moneys due on account of wages for labor and services to specified classes of employees, for any period not exceeding six months preceding the sale of the establishment in which such employee may be engaged, shall be a lien upon such establishment to the extent of the interest of the employer, provided the amount due such employee shall not exceed a fixed sum regulated by statute, and he shall within a specified time have filed a claim. No mortgage or instrument by which a lien is created operates to impair or postpone the lien so given for wages, nor does such lien for wages, operate to impair the lien of mortgages or judgments entered before such labor is performed. In the event of a sale upon execution, such an employee-claimant, if he desires his claim to be preferred and first paid out of the proceeds, must, before the sale, give written notice of his claim and the amount thereof to the officer executing the writ.

As to whether claims of this character have a priority of payment out of funds for distribution in the hands of the sheriff over mechanics' liens not proceeded upon to judgment, but attaching before the work is done for which the claim for wages is set up, the authorities are not uniform, but it has been decided that where the wage claimant for whose compensation a judgment has been confessed by the employer neglects to give the notice required by statute to be given to the officer executing the writ of execution, payment of his claim is postponed to the payment of mechanics' liens attaching before the confession of such judgment.

Bond to Discharge Lien.

The statutes of most states provide for the execution and filing of a bond by the owner or the contractor for the use of persons in whose favor liens might accrue, conditioned for the payment of claims which might be a basis of liens, which bond is substituted as security in place of the lien on real estate.

It has been held that a bond executed by the contractor as principal without the owner of the property uniting therein is sufficient to discharge a lien by a material man.

The owner of any interest in property on which there is a mechanics' lien may become the principal in a bond for the purpose of discharging the lien, and it is not necessary that all the owners or persons interested should unite in the bond as principals. In a number of states statutes have been passed allowing any person having an interest in property upon which a mechanics' lien is claimed to give a bond to dissolve the lien upon his interest, the purpose being to allow anyone possessing an

interest in the whole or any part of the realty to free his title from such an encumbrance and to prevent the land from being sold to satisfy the lien.

When a bond is given, approved and filed, as provided by law, the effect is to prevent liens from attaching, and discharge liens which have been already filed. The filing of a bond after a suit to enforce a lien has been commenced does not necessitate the dismissal of the suit, but after the bond has been filed it is error to decree a lien.

The obligation of the sureties on a bond given by the contractor conditioned for the payment to persons performing labor and furnishing materials of the value of such labor and materials is collateral to the obligation of the contractor to pay therefor, and can be enforced against them only to the extent that the same obligations could be enforced against the contractor. The fact that the principal procured the signature of a surety upon the promise that the principal would afterward contain the signature of another surety which was not done will not relieve the surety from obligation on a bond delivered, approved and filed as the law requires.

A mechanics' lien may be discharged according to the law generally prevailing by the owner depositing in court an amount sufficient to satisfy the claim or the balance due from him to the contractor. The claimant is not entitled to receive the amount deposited until he has established his claim and lien on the land in an action brought for that purpose, and the payment into court is not an acknowledgment of the claimant's right or a waiver of defenses.

Extinguishment of Lien.

The courts will not readily hold that a mechanics' lien, once duly acquired, has been lost or extinguished in the absence of circumstances tending to show a waiver or making it inequitable that the lien should remain in force. Thus the right to a lien is not lost because in an attempted settlement the lienor refused an offer of more than he subsequently recovered, no tender having been made. The right of a sub-contractor to enforce a mechanics' lien on a property is not affected by the insolvency of and the appointment of a receiver for the principal contractor, or lost by the sub-contractor's failure to consolidate his claim for labor with others in an action before a justice of the peace against the original contractor, where such other claims are wholly disconnected with his lien and have no relation to the transaction out of which it arose. Where a contract provides that payment

shall be made for work on final estimate and certificate of an architect approving the work, and a showing that the work is free from all liens, and after the final estimate is made and the certificate procured, the contractor, being refused payment, files his lien, the fact that sub-contractors subsequently file liens for work will not defeat the contractor's lien.

While it has been held that the destruction of the building or improvement out of which the lien is claimed to arise defeats the lien upon the land, the more general rule is that a mechanics' lien which has attached to a building or improvement and the land on which it is situated is not defeated or extinguished by the destruction of the building or improvement by fire or other casualty, but remains effective against the land, even though the building or improvement is destroyed before the work thereon is completed.

A contractor for an entire building not being excused from performance because of the destruction of the building, may, if the building be destroyed before completion and not rebuilt, lose his right to compensation for what was previously done or furnished, and in such case there could, of course, be no lien.

A sale or conveyance of the premises after the lien has attached thereto does not affect the rights of the person filing the lien. This is true as a general rule, even though such conveyance was made before the filing of the lien notice or claim required by statute to perfect the lien, provided, of course, the claimant perfects his lien within the statutory period. It is immaterial that the purchaser bought the property in good faith, and without notice, for the mere fact that buildings or improvements are being erected on the property constitutes constructive notice of the mechanics' liens to persons dealing with the property. As the lien extends to the entire lot or tract on which the building or improvement is situated, a part thereof cannot be sold free from the lien, and it has been held that where labor and materials for the improvement of three houses were furnished under a single contract, subsequent purchasers of two of the lots, with notice, were not entitled to complain that their lots were held responsible for the entire debt.

With reference to work done or materials furnished after a conveyance of the property, it has been held that a lien may be established covering the same if the work was done and the materials furnished pursuant to the original contract after a sale of the premises. However, it should be borne in mind that materials furnished after a sale, not in pursuance of the original contract and without the knowledge of the purchaser, but

merely to preserve the right of lien, are not the subject of a lien. An assignment by the owner for the benefit of creditors does not prejudice the right of mechanics' lien claimants, but their lien as to the property to which it has attached remains superior to the rights of general creditors.

Where the purchaser of land on which there is a mechanics' lien agrees to pay off the same, and save his grantor harmless therefrom, the lien may be enforced against the land in the hands of the purchaser without first exhausting the remedy against the grantor.

A judicial sale of property under a lien prior to a mechanics' lien divests the latter lien and the claimant must look to the surplus proceeds of the sale for satisfaction. Where there are several mechanics' liens arising out of the same improvements and thus of equal rank, a sale under one of the liens passes the land free from all others.

Release of Lien.

A release of a mechanics' lien must be founded upon a consideration, and if the consideration fails the release is void and the lien may be enforced. A release executed by mechanics or material men during the progress of the construction of a building, of all manner of liens, "which we or any or either of us now have or might or could have on or against the said building," is an unconditional agreement to look to the personal responsibility made during the progress of the work, is operative to discharge the building from mechanics' liens as effectively as though made after its completion, and releases the lien for labor done and materials furnished after as well as before its execution.

Vendors who permit a purchaser who has failed to comply with the terms of his purchase to continue the expenditure of money in making improvements after the expiration of the time for payment cannot by notice terminate his interest in the property so as to cut off the lien of a carpenter employed by the purchaser to erect buildings on the land, but the latter may enforce his claim subject to the right of the vendors to recover the purchase money.

The right to a mechanics' lien is not an estate or interest in land which must be surrendered or released in the manner provided by law for such estates or interests. Where a release names no person to whom it is made and expresses no consideration, evidence may be given to show the consideration and to determine in whose favor it was intended to be made. It was recently held that where it was mutually agreed between the

owner and the contractor that he should stop work and receive pay for what was already done, and the contractor thereupon signed a paper releasing the owner from further liability, this did not amount to a release of the lien for what was then done.

A contractor who under one general contract with the owner constructed upon contiguous lots two separate buildings, each requiring the same amount and character of labor and material, after having been paid more than half the contract price released one of the houses and lots from his lien under an agreement with the owner that he should retain a lien on the other for the balance due on his contracts. It was held in this case that the contractor could file and enforce his lien on the remaining house and lot for the entire balance due him where there were no third persons whose interests were affected by the lease.

In conclusion, there remains to be considered the effect of a release. A release by a contractor of his lien for erecting a building, as against a mortgagee receiving his mortgage on the faith thereof, covers the claims for all work done on the building whether before or after the release was executed. Where a contractor who is responsible for the erection and completion of a building according to terms agreed on executes a release of all claims for mechanics' liens, neither the contractor nor the sub-contractors and material men are entitled to liens. Even though sub-contractors may have released their lien, if the contractor fails to complete his contract, and they are subsequently employed by the owner to complete certain work, they can enforce a lien for what is done under the latter employment.

A conditional release is not effective unless the terms upon which it is conditioned are complied with by the person asserting a right under it. A release of the lien as to part of the property covered thereby does not destroy the lien on the rest of the property. However, if one building is released an item for work or materials therein cannot be included in a lien on the remaining buildings.

The right of a sub-contractor, material man, or workman to a lien is not dependent upon the state of accounts between the owner and contractor, and hence the lien is not defeated or affected by any payment to the contractor.

BUILDING CONTRACT FOR BUILDING DWELLING HOUSE

AGREEMENT, *Made this day of , 19 , between of , hereinafter called the owner, of the one part, and and of , hereinafter called the builders, of the other part.*

1. The builders hereby agree with the said owner to execute in strict conformity with the several drawings and detailed specifications prepared by of , architect, and signed by him as well as by the builders, and such further explanatory drawings and instructions as may from time to time be given by the said architect or other architect for the time being of the said owner, duly appointed by him, the several works therein respectively shown or described, or which may fairly be inferred therefrom, in laying the foundations of and entirely building a private dwelling-house on the site of the house lately known as , in the town of , in the county of , according to the said drawings and specifications, such works to be executed in the most sound, substantial, and workmanlike manner, and with the best materials of their respective kinds, the cost of which, with all scaffolding, ladders, and implements of every kind, is to be borne by the builders, for the sum of dollars to be paid to the builders by the said owner.

2. The builders shall be paid in the manner following, that is to say: when the said architect, or such other architect as aforesaid, shall have surveyed the works as they proceed, and shall be satisfied that the builders have used due dispatch and executed such works in a sound and substantial manner, then the said architect, or such other architect as aforesaid, shall from time to time give a certificate for such sum or sums of money as he thinks the builders fairly entitled to receive on account of the work so executed.

3. Provided, nevertheless, that such sum or sums of money be neither of a less amount than dollars, nor more than per cent of the value of the works so executed. And the said owner, for himself, his executors, administrators, or assigns, hereby agrees with the builders, within days after such certificate shall be presented to him, or left at his place of abode above mentioned, to pay the amount thereof, and also to pay the balance of the aforesaid sum of dollars which may remain due to the builders on the completion of the said works within months after the said architect, or such other architect as aforesaid, shall have certified that the said works have been completed to his satisfaction, and that the builders have complied with the conditions of the aforesaid specifications and drawings.

4. The builders further agree with the said owner that they will finish the whole of the said works and deliver up the same complete in every respect according to the full intent and meaning of the said drawings and specifications, and to the satisfaction of the said architect or such other architect as aforesaid, on or before the day of , 19 , unless such day or time shall be extended by an agreement indorsed upon these presents and signed by the parties hereto and then, in such case, on or before such extended day or time; and in the event of the builders failing so to finish and deliver up the said works, the builders hereby agree to allow and pay out of the balance that may then remain to them the sum of dollars for every week the said works remain unfinished and undelivered up as aforesaid beyond the day or time hereinbefore appointed for that purpose.

WITNESS *the hands of the said parties.*

WARRANT FOR RELEASE OF LIENS

WHEREAS, WE, THE SUBSCRIBERS, *have erected and furnished materials for erecting*
on lot or piece of ground situate
And have agreed to release all Liens which we, or any or either of us have, or might have, on the said
by reason of materials furnished, or work performed, for erecting the same. NOW THESE PRESENTS WITNESS, *That we, the Subscribers, for and in consideration of the Premises, and of the sum of One Dollar, to each of us at or before the sealing and delivery hereof by the said well and truly paid, the receipt whereof we do hereby acknowledge,* HAVE *remised, released, and forever quit claimed, and by these Presents* DO *remise, release, and forever quit claim unto the said and to Heirs and Assigns, all and all manner of Liens, claims, and demands whatsoever, which we, or any or either of us now have, or might or could have, on or against the said*
and Premises, for work done, or for materials furnished, for erecting and constructing the said
or otherwise howsoever. So that the said Heirs and Assigns, shall and may have, hold and enjoy, the said
and Premises, freed and discharged from all Liens, claims and demands whatsoever, which we, or any or either of us, now have, or might or could have, on or against the same, if these Presents had not been made.

IN WITNESS WHEREOF, *we have hereunto set our Hands and Seals, the day of the date written opposite our respective signatures.*

Date	*Witnesses at signing*		*Date*	*Witnesses at signing*	
		[L. S.]			[L. S.]
	Cellar Digging			*Stair Work*	
		[L. S.]			[L. S.]
	Stone			*Gas Fitting*	
		[L. S.]			[L. S.]
	Stonemason			*Heating System*	
		[L. S.]			[L. S.]
	Bricks			*Range, Boiler, c.*	
		[L. S.]			[L. S.]
	Bricklayer			*Floor Laying, c.*	
		[L. S.]			[L. S.]
	Cement Work			*Slater*	
		[L. S.]			[L. S.]
	Grading			*Iron Railings*	
		[L. S.]			[L. S.]
	Tinsmith			*Mantels*	
		[L. S.]			[L. S.]
	Lumber			*Tiles and Glass*	
		[L. S.]			[L. S.]
	Carpenter			*Gas Fixtures*	
		[L. S.]			[L. S.]
	Hardware			*Electric Fixtures*	
		[L. S.]			[L. S.]
	Smithwork			*Electric Wiring*	
		[L. S.]			[L. S.]
	Marble Mason				[L. S.]
		[L. S.]			[L. S.]
	Plasterer				[L. S.]
		[L. S.]			[L. S.]
	Painter and Glazier				[L. S.]
		[L. S.]			[L. S.]
	Plumbing				[L. S.]
		[L. S.]			[L. S.]
	Bell Hanger				[L. S.]
		[L. S.]			[L. S.]
	Paper Hanger				[L. S.]
		[L. S.]			[L. S.]
	Galvanized Iron Work				
		[L. S.]			
	Mill Work				

STATE OF PENNSYLVANIA, } *ss.*
COUNTY OF }

BE IT REMEMBERED, *that on this day of 19 before me, the subscriber, a Notary Public of the Commonwealth of Pennsylvania, residing in the City of personally appeared who being duly sworn according to law, doth depose and say that the foregoing is a full and complete Release or Waiver of liens, and has been signed by all persons who have done work or furnished material in and about the erection and construction of the building mentioned at the head of the foregoing Release, except and that all persons who have done work or furnished material in and about the erection and construction of the said building have been paid in full, in cash or by check presently payable, except that the said building has been entirely finished and completed; that the costs thereof did not exceed $; and that he make this affidavit for the purpose of inducing*

SWORN AND SUBSCRIBED *before me this day of A.D. 19* } L. S.

Notary Public.

Commission expires

MONEY

Defined—Loaned—Paid—Received—Legal Tender.

THERE is no more popular subject of interest than money, and we will endeavor to apply the important legal principles concerning money loaned, paid and received, which principles it is most essential to carefully bear in mind.

Money is defined as a universal medium or common standard, by comparison with which the value of all merchandise may be ascertained. In its strict technical sense it is coined metal, usually gold or silver, upon which the government stamp has been imposed to indicate its value. In its more popular sense, any currency, tokens, bank notes or other circulating medium in general use as the representative of value.

A bequest in a will of money does not include securities—nothing passing except coin, lawful currency and funds deposited in the bank for safekeeping. It has been held that a savings bank deposit, being of the nature of an interest-drawing investment, not subject to the immediate order of the drawer, does not pass by a bequest of money in a will. Some courts have held that the word "money" will pass any sort of personal property in order to carry into effect the intention of the testator, and so notes, bonds and mortgages have been included under the word and in one case the proceeds of realty. In general, however, the term "money" is more restricted.

A legal tender is an offer to do a thing conformably to the requirements of the law in the case, and money that may be validly offered in payment of a debt is legal tender. Under the Federal statutes gold coins, silver coins to the amount of five dollars in one payment, and coins of smaller denominations than one dollar (the aggregate of which shall not exceed ten dollars) shall be legal tender. United States notes in payment of all debts, public and private, except duties on imports and interest on the public debt, demand treasury notes and interest-bearing treasury notes (with the exception that the latter are not legal tender in payment of notes issued by a bank) are legal tender. National bank notes are legal tender in payment of taxes, excise duties, public lands and of all other dues to the United States except duties on imports. They are also legal tender of all debts of the United States and in payment of debts due the national banks.

Express contracts to pay coined dollars can be satisfied only by the tender of payment of coined dollars, and judgments in suits brought on such contracts may be entered for coined dollars and parts of dollars, such contracts not being within the legal tender acts. A contract made in this country and to be performed here for the payment of a sum stated in the denominations for a foreign currency is a money contract the same as if made and to be performed in the country where such currency is legal money.

Where a contract for the payment of money is made in one country payable in the currency of that country and a suit for breach is brought in another, the plaintiff can recover such a sum in the currency of the country where suit is brought as approximates most nearly to the amount to which the party is entitled in the country where the contract was made, calculated by the real and not the nominal par of exchange. In order to show the value of foreign money the proof required is similar in kind to that necessary to show the value of chattels in a distant market, such as will enable the jury to express, in our money, the value of the sum shown by the proof to be due in foreign money. When payment of wages is made to an American seaman at a foreign port, in foreign coin, such coin is to be valued at its rate in the home port under the laws of the United States.

Money Lent.

As a general rule an action for money lent will lie wherever one loans or advances money at the request of another, the law implying a contract to pay therefor where there is no express contract. Where, however, money is lent for the express purpose of enabling the borrower to do some act prohibited by law, the lender cannot recover it; but money loaned on a contract made void by statute, the defect being in the form of a contract, and not in the essence of the transaction, may be recovered. An action for money lent cannot be maintained upon a collateral undertaking to guarantee advances to be made to a third person. So, too, where one party to a contract advances money on the contract, supposing that the other is able to perform his part, when at that time performance was impossible, the money cannot be recovered back in an action for money lent.

A loan of money is payable on demand where no time for payment is fixed, and where one lends money to be repaid or applied as he may direct, if no direction be given, the promise to repay may be enforced without a demand. Where money is advanced on the faith of a contract for the delivery of a crop,

and only a part of it is delivered, plaintiff may recover the amount received by defendant over and above the value of the part delivered, without a return or offer to return such part.

In an action for money lent the person or persons to whom the credit was given and also the person receiving the benefit of the loan are liable; and if a joint promise may be implied, the liability is joint. Money paid by one person to another is presumed, in the absence of any explanation as to the cause of payment, to be paid because due, and not by way of a loan; and where plaintiff gives another money which some time previously he received from that other, and the circumstances strongly tend to show that it was put in plaintiff's hands for safekeeping, it is not material error to charge that plaintiff's possession does not raise the presumption of ownership. Upon a certain loan two promissory notes were given, one with security and the other without; the legal presumption raised under such circumstances is that the aggregate sum was loaned to the maker of the notes, and that the lender agreed to look to him exclusively for the payment of the second note. Where the only evidence of a loan are drafts of the defendant on the plaintiff, and it appears that the drafts were drawn for goods consigned by defendant to plaintiff, and defendant sets up a counterclaim for a balance due on the goods, the case turns on the price agreed to be paid for the goods and the burden of proving this is on the plaintiff.

What evidence will be sufficient to establish a loan necessarily depends on the facts and circumstances of the individual case, and is a question for the jury. In a recent case A, upon the representations of B and C, advanced money on B's draft, and it was held that if C, although he made no wilfully false representations to induce the advance, yet received part of the money from B by way of division of the money, he would be liable for the amount so received. An I O U is sufficient evidence in an action for money loaned, although it is not addressed, and no proof is given that U means the plaintiff, except his producing the writing.

Money Paid.

An action for money paid may be maintained in every case in which there has been a payment of money by plaintiff to a third party, at the request of defendant, with an undertaking express or implied to repay the amount, and it is immaterial whether defendant is relieved from a liability by the payment or not. The request to pay and the payment according to it constitute the debt; and whether the request be direct, as where

the party is expressly desired by defendant to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference.

Although an action of assumpsit (the ordinary action to collect a debt) cannot be maintained upon the mere voluntary payment of a debt to another person, yet if one person, in order to protect his own interest, pays a debt for which another is legally and personally liable, the law will imply an assumpsit on the part of the latter to the former. A request will be implied where the consideration consists in plaintiff's having been compelled to do that which defendant was legally compellable to do. It is important to bear in mind the following principle of law: Where, in order to protect his property, real or personal, the owner pays off an outstanding encumbrance thereon, which another has undertaken or is legally liable to pay, he may recover from such other the amounts so paid by him in an action for money paid.

A person who has been compelled for the protection of his interests to pay taxes for which another is legally and personally liable, may recover the amount so paid from him whose duty it was to pay such taxes. It has been held that where the title to land is in dispute, and the taxes thereon are paid by one of the claimants, and the claims of the other party to the title are ultimately established, the money so paid as taxes must be refunded with interest.

Where one person, although himself under a legal liability, pays a sum for which another is primarily liable, he may recover from the latter the amount so paid. It is not indispensable ordinarily to an action for money paid that the payment should have been in money. A payment in any medium which the parties regard as equivalent to money, such as goods, chattels, securities, credits or services, is sufficient to support the action.

The giving of a bill of exchange or negotiable note for the debt of another may be regarded as payment and an action for money paid may be maintained. But since a mere obligation to pay is not the same as payment, a bond given for the debt of another is not such a payment as will support an action for money paid, and this is an important distinction to note. An action for money paid does not lie except upon a previous request or a subsequent ratification on the part of defendant or his authorized agent. But where money or its equivalent has been paid for the use of another, the request or ratification may be either expressed or implied. The request, as well as the promise, will be implied where the consideration consists in plaintiff having been

compelled to do that which defendant was legally compellable to do, or where defendant has adopted and enjoyed the benefit of the payment. A request to one person to pay a sum of money will not authorize another, who advances the money, to recover it in action for money paid, brought in the name of the person to whom the request was made. It should be noted, however, that a mere voluntary payment for the benefit of another gives to the party so paying no right of action against the party for whose benefit the payment was made, unless the latter subsequently ratifies it.

Voluntary payments may be divided into two classes—sometimes money has been expended for the benefit of another person under such circumstances that an option is allowed him to adopt or decline the benefit; in this case, if he exercises his option to adopt the benefit, he will be liable to repay the money expended, but if he declines the benefit he will not be liable. But sometimes money is expended for the benefit of another person under such circumstances that he cannot help accepting the benefit; in fact, he is bound to accept it; in this case he has no opportunity of exercising any option, and he will be under no liability to repay money advanced on his behalf.

Where two persons from their common funds have paid a debt of another, they may maintain a joint action of assumpsit for the money paid; but where a judgment against a firm, which a third person has agreed to satisfy in consideration of a receipt of the full amount thereof, but fails to do so, is paid off by one partner individually, he may recover from such third person in an action for money paid without joining his partner as a party plaintiff. The measure of damages in an action for money paid for the use and benefit of another is the sum actually paid by plaintiff together with interest from the time of payment.

Where, whether through wrong, inadvertence or mistake, one person is wrongfully credited on account or in settlement of accounts with the payment of money to which another is, in equity and good conscience entitled, the latter may maintain an action for money had and received to his use against the person so credited. Thus an agent who has settled an account with his principal, as having been paid by himself to the creditor, is liable to the latter as for money received to his use. So likewise where an attorney or agent has discharged a debt due to his principal, and applied that debt to pay his own debt, the amount of the debt so discharged may be recovered by him.

The question in an action for money had and received is: to which party does the money in equity, justice and law belong?

All that the plaintiff need show is that the defendant holds money which in equity and good conscience belongs to him.

The rule is well settled that an action for money had and received will lie to recover money paid by the plaintiff to the defendant for a consideration which has wholly failed, unless the failure of consideration is due to some fault on the part of the plaintiff himself. Money paid under a mutual mistake as the price of that which has no legal existence or validity may be recovered back as paid without consideration where the vendor is responsible for the mistake or represents a person so responsible. Where one person has received money as an indemnity in which another has a right to share, the latter may maintain an action for money had and received for his portion. Likewise an action for money had and received may be maintained by one tenant in common to recover his share of the proceeds of the common property, real or personal, from his co-tenant, by whom they have been received.

In order to support an action for money had and received, there must be some privity existing between the parties in relation to the money sought to be recovered. This privity may, however, be either implied or express. The weight of authority is to the effect that no further privity is required than that which results from one person's having another's money which he has no right conscientiously to keep. In such cases the law implies a promise that he will pay it over. Privity in this connection exists between one who receives money or its equivalent under a promise or duty to pay it over to a third person. When money to be paid on a contract under seal is, by the terms of the contract, made payable to one not a party thereto, such person may sue in assumpsit for money had and received, using the sealed instrument as evidence of his right to recover.

Where there are two claimants for the same money and one of them is recognized as being entitled to it by the person from whom it is due, and is paid, the other cannot sue him to recover the money, for the reason that having received the money under a claim of right in himself, the law will not imply any contract or promise by him to hold the money for the use of the other claimant, or to pay it over to him, and, therefore, there is not, under the circumstances, any privity of contract on which to found the action. However, where the liability of the person from whom the money was due has been discharged by payment to one claimant who does not assert any hostile claim to the whole amount, it has been held that another claimant who is rightfully entitled to share in the money may maintain an action for money had and received against the claimant so paid.

Numerous Contingencies.

If an agent is employed by several principals, the common employment creates a relation and privity between the principals such as will sustain an action for money had and received by one against another to recover money belonging to the former and paid over by the agent to the latter. One in whose behalf money is borrowed without authority but to whose use it is applied by the borrower is not liable to the lender as for money had and received.

As a general principle of law, to sustain an action for money had and received, it must appear that the money in question belonged to plaintiff; that it was secured by defendant without plaintiff's consent and without giving any valid consideration, or if with plaintiff's consent, upon a consideration which has failed. Any surplus arising on the sale of a security for a debt may be recovered in an action for money had and received by the person entitled thereto, whether the original debtor or a subsequent mortgagee.

In cases where property is conveyed by a debtor to a trustee to be sold for the benefit of creditors who sells the property for more than enough to satisfy all claims, a creditor for whose benefit the trust was created may maintain an action for money had and received against the trustee. Such an action will also lie against one who has received double payment, to recover the overplus.

It frequently happens that one person receives money from another for a particular purpose, and neglects or refuses to apply it to such purpose. If such be the case, the money may be recovered back in an action for money had and received. This same rule applies where money is received for a purpose which is afterward abandoned or which cannot be accomplished.

An action for money had and received will always lie where one has obtained money from another by oppression, imposition, extortion or deceit, and the law implies a promise from such person to return it to the lawful owner, whose title thereto cannot be annulled by the fraudulent or unjust dispossession. Money paid on a raised check may be recovered where the one seeking recovery has not by negligence prejudiced the rights of the person from whom recovery is sought.

In an action for money had and received it is immaterial how the money may have come into defendant's hands, and the fact that it was received from a third person will not affect his liability, if in equity and good conscience he is not entitled to hold it against the true owner. It has been decided that in order

to sustain the action under consideration it is not necessary that a payment made to defendant by a third person with plaintiff's money should have been involuntary, but only that it should have been made without plaintiff's consent. Where, however, one who has embezzled money transfers it to another in due course of business, mere ground of suspicion of defect of title or knowledge of circumstances which would excite suspicion in the mind of a prudent man or gross negligence on the part of the transferee will not defeat his title as against the owner, the test being honesty and good faith on the part of the transferee and not diligence.

An action for money had and received cannot be resorted to where there is a special contract open and unexecuted and the breach of the contract is the basis of the action. Even though a special contract exists if it has been completely executed so that only the duty to pay money remains, a recovery may be had in an action for money had and received. So likewise the action lies where money is deposited upon a contract by which the depositee undertakes to do something and the contract is wholly unperformed. Where a broker disobeys instructions in selling grain which he has bought for his principal, deposits made by his principal as security may be recovered in assumpsit. So money deposited with another as security against loss from any decline in the value of goods to be purchased for the depositor may be recovered in an action of assumpsit if the party purchasing the goods neglects to sell them according to instructions of the depositor.

Persons Entitled and Liable.

It is only one having the legal title to the money in whose favor the law raises a promise to pay and who may maintain an action for money had and received. The action may be maintained by a trustee and lies in favor of a personal representative either in his own name or in his representative capacity. Where the cause of action accrued after his decedent's death and the money if recovered would be assets, so an administrator who has paid to a distributee an amount in excess of what was due him, and has made a final settlement of his accounts, may maintain an action for the excess in his own name, since he is personally chargeable with the excess. One who purchased real estate subject to an encumbrance which he supposed to be valid and who afterward paid it off cannot maintain an action to recover back the amount of such payments upon discovering that the encumbrance was procured by fraud, as he was not the party defrauded. One who, at another's request, advances money for him, being

entitled to look to the latter or his estate for reimbursement, cannot maintain an action for money had an received against the person to whom the money was advanced. It has recently been held that an action for money had and received cannot be maintained by a corporation to recover a sum of money received by a former director as a bribe for resigning his office and procuring control of the corporation to be turned over to the purchaser for corrupt purposes.

An action lies against one into whose hands money actually belonging to the plaintiff can be traced, as well as where he received the money in the first instance. The recovery, however, is limited to cases where money is received for the plaintiff by some one standing in a fiduciary capacity to the plaintiff. An action for money had and received may be sustained against an agent who has received money to which the principal has no right, if the agent has had notice not to pay it over. But if the money is paid over with intent to pass it to the credit of the principal, before notice is given to the agent, no action will ordinarily lie against the latter for its recovery.

If a debtor places money which he owes his creditors in the hands of his agent or servant to discharge the debt, the creditor may maintain an action against the servant or agent if he retains the money.

But if, after money has been placed by the debtor in the hands of an agent to be paid a creditor, the creditor fails to sue the agent until the debtor recalls the money in his hands, the creditor can maintain no action against the agent. If a debtor makes an overpayment to the creditor's agent, through mistake, and the money is transmitted by the agent to the principal, the agent is liable to the debtor for the excess in an action for money had and received.

If the money is obtained by the agent by compulsion or extortion it seems that an action will lie against him, although it has been paid over to his principal, unless the payment was made expressly for the use of the principal.

The rule is quite elementary that to enable a person to maintain an action for money had and received, it is necessary for him to establish that the person sought to be charged had received money belonging to him or to which he is entitled; that is the fundamental fact on which the right of action depends.

Where money is sent to the treasurer of a corporation for stock which is never delivered, the corporation and not its treasurer is liable.

If money is paid through mistake to plaintiff's wife, in his

presence, with his consent and approval, and he knew she was not entitled to it, he is liable therefor in an action for money had and received.

In order to enable a party who is entitled to rescind a contract on account of failure of consideration or non-performance of the other party, to bring an action for the money which he has paid on account of it, he must restore or tender what he has received in part performance, unless the right is waived.

One who receives money in advance on a contract which he is without authority to make, and which he afterward refuses to fulfil, is liable without any previous demand. The doctrine is stated in a number of decisions and text-books that where there is a debt or duty to pay money presently, not dependent on any contingencies, an action may be brought without any previous demand. Otherwise a previous demand is necessary.

In a recent case A, having a draft on a bank in New York, for $1,000, two-thirds of which belonged to himself and one-third to B, put such draft into the hands of B, to receive the money thereon and to divide the avails in that proportion, and B received the money, and after a reasonable time had elapsed A sought to recover his share in an action for money had and received, against B, without previous demand or request, it was held that no such demand or request was necessary.

Where one had money belonging to another rightfully and lawfully in his possession the law requires that it should first be demanded of him before an action can be maintained against him therefor. Thus where one receives money as trustee, and does nothing amounting to an abuse of the trust or inconsistent with the understanding or agreement of the parties, he is not liable in an action for money had and received without a previous demand. However, if there has been an abuse of the trust no demand is necessary.

If a bank upon which a check is drawn payable to a particular person or order pays the amount of the check to one presenting it, with a forged endorsement of the payee's name, both parties supposing the endorsement to be genuine, a right of action to recover back the money accrues at the date of the payment, and the Statute of Limitations begins to run from that date.

EXECUTORS AND ADMINISTRATORS

Appointment and Qualification—Ancillary Administration—Powers and Duties—Assets of Estate—Claims Against—Accounts—Discharge.

IT IS quite customary for business men, in disposing of their property, to appoint business associates executors or trustees, with power to conduct or manage their affairs for particular purposes and for limited periods of time. Although the majority consult attorneys with reference to their duties under such appointments, it is essential that those acting as executors, administrators or trustees should possess a knowledge of the general principles of law governing their qualifications, duties, etc. It will consequently be our object to discuss briefly the law on this subject.

When a person dies leaving property, his estate is usually set apart to be administered or settled under the immediate supervision of the courts. The main objects of such jurisdiction are that the personalty of the deceased, together with income and profits, be properly collected, preserved and duly accounted for; that his just debts and the charges consequent upon his death and the settlement of his estate be paid and adjusted; that local transfer inheritance taxes and Federal succession taxes, if any, be paid; and that the residue of the estate be distributed among such persons and in such proportions as the will of the deceased, if there be one, or if not, the statutes of distribution, commonly known as the intestate laws, may prescribe.

The duty of settling and distributing the estate is vested in persons who are termed the personal representatives of the deceased. They are of two classes, executors and administrators.

Definitions.

An executor may be defined as the person to whom the execution of the last will or testament of personal estate is by the testator's appointment confided. An administrator is a person authorized by a competent court to manage and distribute the estate of an intestate, or of a testate who has no executor. This definition is given in Bouvier's Law Dictionary, except the phrase "by a competent court." This phrase is necessary to the completion of the definition, for the administrator derives all his authority from the court which appoints him.

An executor is not vested with any title or power until he

becomes so vested by letters testamentary. When a testator by his will devises his real estate to an executor in trust, to recover the rents and profits, or to accumulate the same, such executor takes as trustee by devise the instant the testator dies, and becomes vested with all the estate and all the power conferred in respect to the same. When a testator devises his real estate to his executor in trust to sell the same to pay debts or legacies, the executor takes no estate by the will, as trustee or otherwise. It is a mere power, and is an incident of the office of executor, as executor enabling him to convert into actual personalty that which is made equitably so by the will.

Administration means the management of the estate of a decedent and expresses the jurisdiction assumed by the proper court over it. It includes more than the mere collection of the assets, the payments of debts and legacies, and distribution to the next of kin. It involves all that may be done rightfully in the preservation of the assets, and all which may be done legally by the administrator in his dealings with creditors, distributees, or legatees, or which may be done by them in securing their rights; and it includes all which may be done in relation to adverse claims to assets which have come to the possession of the administrator as the property of the intestate.

Two Classes of Estates.

The estates of deceased persons fall into two classes; first, testate, which includes those estates as to the settlement of which the deceased has left directions embodied in a will, in which case the deceased is termed the testator; and, second, intestate, which includes the estates of persons who have left no wills. The term "intestate" is also used to designate a person who has died without leaving a valid will. There may, however, also be cases of partial intestacy where the deceased has left a will containing directions as to the disposition of a portion of his property, but where a portion is left undisposed of.

It is a general principle of law that real estate descends directly to the heir of the decedent, and that personal estate passes to the personal representatives of the deceased. Nevertheless debts and charges remain obligatory upon the estate so long as property of the deceased may be found for their satisfaction, and hence if the personal assets prove insufficient, the real estate may be applied to make up the deficiency. Administration is usually a necessity where a person dies leaving unpaid debts and property which may be made available to pay them, and where a person claims to be a creditor of the estate and applies for the

appointment of an administrator, it is not necessary that he should conclusively prove the existence of the alleged debts, but if he makes a *prima facie* case this is sufficient to authorize and require the appointment of an administrator. However, in order for an alleged debt to form the basis of a grant of administration, it must be a legal claim upon the deceased or his estate.

The law of executors and administrators will be considered in the order of their appointment and qualifications, their powers and duties, termination of their office by removal, revocation or resignation, and last, the remedies pertaining to their office, including actions by and against them, etc.

If the deceased has left a will, appointing an executor, the will should be probated as soon as possible. The general rule of law is that the place of a decedent's last domicile shall determine the probate jurisdiction to grant letters and supervise the settlement of his estate, and the sole, or at least the principal, grant of letters ought to be taken out and the will proved in the country, the state, and, indeed, the very county where decedent was domiciled at the time of his death. In case one dies while traveling outside the state or country of his domicile, the foreign court has no jurisdiction, although one who roams after leaving permanently one domicile has been held to have settled down where he died. The will should be deposited as promptly as possible after death with the register of wills "of the county within which was the family or principal residence of the decedent at the time of his death, and if the decedent has no such residence, then with the register of the county where the principal part of the goods and estate of such decedent shall be." The signature to the will must be proved by witnesses, the number of which vary in different jurisdictions.

When no will is left and there are no creditors of the estate or the creditors agree, distribution of the estate may be had without recourse to the courts, by agreement of all interested parties, being of full age and competent, provided no necessity exists for bringing suit to collect the property or for other purposes, such as the formal transfer of title. The existence of a will appointing an executor generally renders it necessary for the estate to be settled through the courts, which alone have cognizance of such matters, although in several states statutes have been passed which provide that, if the testator so requests in his will, the will may be carried out by the executor without any probate, or with probate and without further proceedings in court, according as the special statute may be worded.

In case of intestate estates there is no reason why the estate

should be put to the expense and delay of taking out administration in cases where it is in such shape that this mode of settlement can be employed without injustice or irregularity. Therefore, if there are no creditors and all the parties entitled to the estate as distributees are of age and competent to transact business, and agree to divide up the estate without taking out administration, and the property is of such a kind as not to require formal transfers, such as would be necessary in transferring shares of stock in corporations or deposits in savings banks, and is in the possession of the distributees, so that no suit at law is necessary in order to recover possession of it, then by agreement among the persons entitled to distribution the estate may be divided up among them without the appointment of any administrator. If distribution is once made under such an agreement, none of the distributees can afterward require administration, because of the estoppal of their agreement to divide without administration. If, however, there are any creditors of the estate who are not satisfied with this method of settling the same, and insist on the appointment of an administrator, they can compel this to be done, or, in default, can take administration themselves, since they are entitled to have some one appointed representing the estate whom they can sue for their claims, or else to be themselves placed in such a position that as administrators they can satisfy their own claims.

Appointment and Qualification.

As we observed before, an executor derives his authority from the will appointing him. The interest of every executor in his testator's estate is what the testator give him, and a testator may make a trust absolute or qualified respecting either the subject-matter, the place where the trust shall be discharged, or the time when the executor shall begin or during which he shall continue to act as such. The executor's appointment also may be made conditional, as upon his giving security for paying the debts and legacies, or possessing certain qualifications at the time of the testator's death, and unless the conditions are fulfilled the nomination goes for naught.

Where several executors are named or designated together, they are intended to be co-executors and should be qualified together, all being thus legally regarded as an individual in place of a sole executor, and of various persons named as co-executors he or they who may be alive and willing and competent to accept the trust on the testator's death can alone be deemed qualified for the office. Instead of appointing co-executors to serve together,

a testator may name two or more, substituting one after another in order, so that if the first dies or cannot act, the next may act and so on. A direction in a will that if the executor appointed thereby should die, a certain other person should be his successor with all the authority and power that he would have had if appointed in the first instance, requires the appointment of such person, although it occurred after testator's death.

Where a will is proved, it is the duty of the court to issue letters testamentary to the person named as executor upon his application. As a general rule of law, all persons who are capable of making wills are capable of becoming executors, and the law even extends further than this. An infant, although not of full testamentary capacity, may be appointed executor, but the statutes in most states disqualify an infant from performing the functions of a sole executor, so that some other person must be appointed administrator until the executor reaches his majority. The fact that a person named as executor is an alien or a non-resident does not disqualify him to act as executor. If an executor does not wish to perform his duties, and the law cannot compel one nominated as executor to act as such, the safest policy is to file a written renunciation.

An executor cannot assign the office to another, since no one to whom a power relating to property is given by another on account of a special and personal confidence can delegate that power to another.

Administrators.

Statutes in the various states regulate the right of particular persons to administer on the estate of a decedent, and the priority of right between two or more persons who ask for the issuance of letters to them. The principle which underlies the right to administer is that the grant of letters of administration shall be made to the person or persons to whom the personal property of the deceased, intestate, or the greater part of it, descends as distributees. Letters of administration are ordinarily granted to the widow or surviving husband of the testator, as the case may be, or to such of his or her relations or kindred as by law are entitled to the residue of his or her personal estate, after payment of his debts. Of those so entitled, preference is first given to such as are in the nearest degree of consanguinity with the decedent, males being preferred to females. In case of the refusal or incompetency of every person letters of administration may be obtained by one or more of the creditors of the decedent applying therefor.

The principle that the right to administer the estate follows the right to the estate in distribution has been recognized quite universally, the reason being obvious, in that it gives the management of the property into the hands of the person or persons who will ultimately own it, and whose claim upon it is only deferred until the creditors of the deceased are paid, when the property will be vested in those entitled.

The right of the husband to administer upon his wife's estate, whether this right is given by a statute or decision, depends upon the existence of a valid marriage between him and the deceased at the time of her death. Consequently if the marriage supposed to exist between them is void for any cause the supposed husband has no right of administration. Thus if there was a prior existing marriage, or one of the parties is *non compos mentis* or under age of lawful marriage, the supposed husband has no right to administer. If, however, there has been a valid marriage which has been dissolved, as, for instance, when a divorce has been granted dissolving the marriage for desertion, etc., he loses his right to administer. It should be noted that no misconduct of the husband toward the wife bars his right to administer, even if it is of such a nature as to afford ground for a divorce, unless a divorce has actually been obtained.

We noted that in case of the death of a husband, without leaving a will, his widow is first entitled to letters of administration upon his estate. If the widow renounces, or is incompetent, no one can be appointed but one or more of the next of kin, if competent and willing. The widow's right to administer her husband's estate depends upon the legitimacy of her marriage and its existence at her husband's death. If it is void or has been dissolved by divorce she cannot claim the right to administer. There must be proof that the applicant for letters of administration is the widow of the deceased, if this fact is denied. Marriage may be proved by evidence of cohabitation, declarations and repute. If the only evidence of this point is the presumption arising from cohabitation, the evidence as to the cohabitation must not be such as to make it doubtful whether the cohabitation was lawful or illicit. In a well-known case the testimony of the widow to the marriage, corroborated by an entry in the family Bible by the deceased and a cohabitation and reputation of marriage for twenty years, was held to be ample evidence of a marriage though contradicted by admissions of the widow and husband that they were not married. In some states the court is given a choice to appoint either the widow or next of kin. In such states the widow will not be appointed where she has eloped

from her husband, or cohabitated with another man, or deserted or lived separate from her husband. But if the widow is so entitled to the office a separation does not bar her right, although by articles of separation or any antenuptial contract she agreed to renounce all interest in her husband's estate. A divorce obtained by the husband through fraud, as where he deserts his wife and moves into another state, and there sues and obtains a divorce from her, does not deprive her of her right to administer. If a widow expressly renounces and disclaims her right, and refuses to take administration, she waives her right, and will not afterward be allowed to cause letters issued to a third party to be revoked.

Next of Kin.

Neither husband nor wife can be regarded as next of kin one to the other, by virtue of the marriage tie alone, and this reservation extends to all marriage connections, since common blood is the test of consanguinity.

The right to administration arising from kinship being usually dependent upon the right to share in the distribution of the decedent's estate, the nearest of kin to the decedent are as a rule preferred to those more remotely related. From among two or more persons equally akin to the deceased who seek appointment as administrator, the court may choose the most suitable. The policy of some states distinctly places the male next of kin before the female for receiving the appointment.

The next of kin of the deceased are ascertained by computation according to the method of the civil law. In a few states computation is made according to the rules of the common law, which are the same as those of the canon law, that is, to begin at the common ancestor, and reckon downward, and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus A and his brother are related according to the common law in the first degree, for from the father to each of them is counted only one step. A and his nephew are related in the second degree, for the nephew is two degrees removed from the common ancestor, that is, his own grandfather, the father of A.

The method of computing the degrees of kindred in the civil law is to count upward from either of the persons related to the common ancestor, and then downward again to the other, reckoning a degree for each person ascending and descending. For example, A and his brother are related according to the civil law in the second degree, for from A to his father, the common ances

tor, is one degree, and thence descending to the brother is another degree. A and his nephew are related in the third degree, for ascending from A to his father is one degree, and descending thence to his brother is a second degree, and to the brother's son a third degree. So a grandfather is by the civil law nearer of kin than an aunt, for it is two degrees to the grandfather, while to the aunt it is one degree more, that is from the grandfather to the aunt. It is important as a matter of practical education to understand the method of computing the nearest of kin in a family. In Pennsylvania this is done according to the rules of the civil law as above explained. Maryland is the only state in the East, I believe, where the rules of the common law are adopted. If one dies leaving parents but no children, the parents are of the first degree, and their rights are accordingly superior to those of brothers and sisters, who stand in the second degree, and they will accordingly be preferred upon their application for letters of administration.

Illegitimate and adopted children have no right to administer unless this right is specially conferred by statute. It often happens that several relatives will be found to be equally near in point of kinship to the deceased, and the question then arises whether administration shall be granted to all, or if not to all, to which of them it shall be granted. In deciding upon this point the court has discretionary powers, but there are several principles of preference which are so important and are of such general application as to deserve notice.

In the first place, it may be laid down as a leading principle that the court will ordinarily appoint only one administrator, as the existence of two or more renders the proceedings too complicated. Even when the parties interested are willing, and there are two applicants, a judge is not bound to make a joint appointment, but may in his discretion appoint only one.

Ordinarily the half-blood is admitted with the whole in determining the next of kin, but if among several of equal degree some are of the half-blood and some are of the whole, the latter will generally be preferred in the appointment of an administrator. However, a brother of a half-blood is generally preferred to a sister of the whole blood, because a male administrator is preferred to a female. As between a married and an unmarried woman of equal degree of kinship to the deceased, the unmarried woman will be preferred. A resident of a state is usually preferred to a non-resident. It need hardly be said that an elder child does not stand in a nearer degree of kinship than a younger one, but an elder son will be preferred to a younger merely as a matter of discretion of the court.

Letters of Creditors.

Statutes in most states generally provide for the appointment of a creditor of the deceased as administrator where no application is made within a suitable time by those having legal priority, or where the latter prove incompetent. Questions have frequently arisen as to what constitutes a creditor under the law in the present connection. One whose claim against the estate is for the funeral expenses is a creditor of the estate, such as an undertaker or a relative who has paid the bills for the funeral. But one who was a creditor of the deceased by virtue of a cause of action which does not survive—as, for example, a breach of promise of marriage—is not such a creditor as is entitled to administer the estate. The person applying for letters as a creditor must show that he has a valid claim against the estate of the decedent, and if the facts which he alleges do not constitute a valid debt, his application will be denied. To illustrate, where one claims to be a creditor for money loaned on stock of a company, and the transaction proved to be a purchase by him of stock of the company from the deceased, as treasurer of the company, it was held that these facts constituted no debt of the deceased, but, if any, one of the company, and therefore the applicant had no right to the appointment of administrator.

Where a decedent has left a will, but such will does not nominate any executors, or none of the persons named as executors can or will act as such, the court appoints a person to perform the necessary duties connected with the settlement of the estate, and such appointee is termed an administrator "with the will annexed." Mention should be made of the right of the residuary legatee (person named in the will to receive the residue of testator's estate) to letters of administration with the will annexed, in preference to either surviving husband, widow, next of kin or creditors. This right is based upon the governing principle that the person most beneficially interested according to the terms of the will should have the preference. If the residuary legatee is dead, or renounces, or is incompetent, the grant of letters of administration will go to the other legatees, in accordance with their interests.

Sometimes when the interested parties are making a contest as to who should distribute the estate, a temporary administrator is appointed, and in case of such appointment the principle that the grant of letters follows the interest in the estate has no application, for the object of the grant of letters is merely to put the estate in safe custody while the parties interested are in litigation.

As a general rule the right to administer cannot be assigned,

as it is purely personal. By statutes in many states, including Pennsylvania, those persons entitled to appointment as administrators may nominate others in their place. The right of persons who are entitled to administer, but who reside out of the state, to appoint some resident of the state to take administration in their stead, is in some states recognized, at least as far as a surviving husband, widow and next of kin are concerned. By statute non-residence in a state renders the person otherwise entitled to administer incompetent, and in such case his appointee is also incompetent. A non-resident, in such a case, if he wishes to gain a right to nominate, must become a *bona fide* resident of the state, which involves actual residence in the state and intention to become a resident. The court will judge upon all the evidence whether a non-resident has become a *bona fide* resident. Thus where a person came into Pennsylvania upon his brother's death, to look after his affairs, and stayed a few days, bringing his daughter with him and leaving his wife in his former residence, and then applied for letters of administration for his nominee, the court held that he had not gained a *bona fide* residence, although he testified directly that it was his intentions to become a resident when he made the change, but he could not say how long he should keep the residence thus acquired.

Acceptance or Renunciation.

The offices of both executor and administrator may be either claimed or accepted by the person or persons entitled to them, or may be renounced by them. If a person entitled to either office expressly renounces the right, or neglects to claim it after being duly cited into court for that purpose, he forfeits the right. An executor may expressly accept the office in writing, or by applying for appointment in accordance with the will. It is not generally held that the executor is bound to accept the office for merely intermeddling with the estate, and it is said that a trusteeship, whether as executor or otherwise, cannot be imposed upon any party except by his own consent, or as a consequence of his own acts. Delay and inaction are generally treated as evidence of refusal. Even if a person named as executor, together with others, pays the funeral expenses, this does not amount to an acceptance of the trust.

The question has arisen in several cases whether a contract to renounce for a valuable consideration the office of either executor or administrator is a valid one. The weight of authority holds that such a contract is illegal because it would introduce so much uncertainty as to who would finally administer the estate,

and a testator would feel no confidence that the person whom he had named as executor in his will would finally be the one to dispose of his estates. Therefore, the courts will leave the parties in the condition in which they have put themselves. A contract to pay one a sum of money for acting as administrator is legal, and so is a contract to act as administrator without making any charge for services.

Foreign Administration.

We have heretofore considered the appointment and qualifications of executors and administrators. In this connection it is timely to consider briefly foreign and interstate administration before discussing the duties of executors and administrators.

The appointment of an executor or administrator to his office is in effect creating an officer of the court, and his power and authority, being derived from the court, can have no absolute force beyond the limits of the state or country which has created the court appointing him. Frequently it happens, however, that decedents leave property situated in several states or countries. Questions then arise as to the legal method of carrying out a will relating to such estate or of administering the estate in case of intestacy.

It may be laid down as a general principle that the validity of a will of personal property is decided by the laws of the country or state in which the testator was domiciled at the time of his death. If the will was valid, either in general as to personal property or in regard to any special bequests of personal property in the country in which the testator was domiciled at the time of his death, then it is so far valid in any other country or state. This rule is merely an application of the general principle that movable property follows the person of its owner, and is governed by the laws of the place where he has his domicile. An apparent exception to this rule is found in the rule that where a power of appointment as to personal property is given, to be exercised by will, and the power is exercised by a will executed in a manner and form which is valid in the state where the personal property is situated, but not valid at the domicile of the testator, this will is considered to be a good execution of the power. It should be noticed, however, that the question in this regard does not concern the validity of the will, but rather the execution of a power in regard to which the courts are strict in holding that it must be correct in every particular, according to the law of the place where the property is situated. The rule governing the question of domicile

we have considered in connection with the jurisdiction of the courts to grant letters of administration. It is important to bear in mind that, since the validity of a will of personal property depends upon its validity at the domicile of the testator, and not at the place where the will was originally executed, it follows that if the testator changes his domicile after making the will, into a country where the will is invalid and dies there, the will is invalid everywhere.

The validity of a will of real estate, as to the capacity of the testator, form and execution, depends upon and is governed by the law of the place where the land or real estate is situated.

Probate of a will in one country is conclusive of the validity of the will in all other countries. The judgment of a court of probate allowing the proof of a will is binding upon the rights of all persons interested in the property named, although they are not named as parties in the case. The duty of a probate court when a will is offered to it for probate which has already been probated in a foreign country consists in deciding whether the record presented is duly authenticated, whether the court in which the will purports to have been allowed had jurisdiction, and whether there is any estate, real or personal, in the county in which the will may operate, and also as to actual fraud in obtaining the probate of the will, and as to all facts necessary to the establishment of a will. But as to the regularity of the proceedings, and their conformity to the laws of the country or state where they are had, both by the Constitution of the United States and by the common law, the judgment must be conclusive, as each state is required to give such effect to the judgments of the different states. Among the questions which are settled by the foreign probate are the capacity and sanity of the testator, including the power of a married woman to make a will, the due execution of the will, the competency of the witnesses and the regularity of the proceedings for probate.

As to wills both as to personalty and to real estate, they are to be interpreted according to the laws and customs of the country or state of the domicile of the testator, since he is supposed to have been conversant with those laws, customs and language.

Principal and Other Administration.

The main rule or essential point of the rules relating to administration in various jurisdictions is that the administration which is taken out in the country or domicile of the deceased is the principal administration. Any other administration is ancillary, whether it may or may not be prior in point of time to the

administration in the domicile of the deceased. The reason for this distinction is evident in the fact that the personal estate, which is the basis for administration, is governed by the laws of the domicile of the deceased, and all questions as to the settlement and distribution of that estate should be settled by the laws of that country or state.

Questions arising as to the administration of an estate which is located in various states are often complicated. Although the words "principal" and "ancillary" seem to imply a relation of dependence between the several administrations, this is not the fact. Each administration is wholly independent of the other, and the executor or administrator appointed in the ancillary jurisdiction has as complete and exclusive authority therein as the principal one has in the state of domicile. Ancillary administration may be granted although there be no principal administration.

Ancillary administration being necessarily that of a non-resident, the taking out of such administration depends upon the existence of assets in the county where such administration is applied for. Hence if there are no assets in the county where application is made there cannot be any grant of letters, nor will letters be granted upon petition of a non-resident creditor, if there are assets but no resident creditors. The Supreme Court of the United States has laid down definite principles governing ancillary administration. These rules are of general application throughout the United States, the substance of which may be thus stated:

Every ancillary administration upon principles of international law is made subservient to the rights of creditors, legatees and distributees in the country where such administration is taken out, although the distribution as to legatees and distributees or heirs is governed by the law of the place of the testator's or intestate's domicile. The important question frequently arising is what is to be done as to the residue of the assets, after discharging all the debts and other claims of the deceased, due to persons resident in the country where the ancillary administration is taken out? Is it to be remitted to the domicile of the testator or intestate, or be there finally settled, adjusted and distributed among all the claimants according to the law therein pertaining, or may creditors, legatees or distributees of any foreign country come into the courts of the country granting such ancillary administration and there have all their respective claims adjusted, and in cases of insolvency or other deficiency of assets, what rules are to govern in regard to the rights, preferences and

priorities of different classes of claimants under the laws of different countries seeking such distribution of the residue?

It seems now to be understood, as the general result of authorities, that courts of equity of the country where the ancillary administration was granted are not incompetent to act upon such matters and to decree a final distribution of the assets to and among the various claimants having rights in the funds, whatever may be their domicile.

Therefore, where a decedent having property in Pennsylvania dies domiciled in another state, where his will was duly proved or letters of administration granted, or if a foreign executor or administrator wishes to bring an action in Pennsylvania to recover or follow assets, it is necessary to apply to the register of wills of the proper county for ancillary letters of administration. If the decedent died intestate, the certificate of the proper officer granting the letters of administration duly authenticated under the act of congress, must be filed with the register of wills of the proper county in this state before securing ancillary letters.

Administrator's Liability.

The principal and ancillary administrations are, as we have noted, distinct in regard to the assets which are to be administered in each. Each administrator is liable for and bound to inventory and administer all the assets of the estate of which he has knowledge, except those which lie within the jurisdiction of some other administration. Consequently if one who is appointed administrator in the state where the deceased resided takes ancillary administration in another state, he is not liable in the latter state to creditors residing there for assets in his principal administration. Nor is he liable to creditors in other states in which he has not taken administration. When there are assets in several states, and administrators in all of them, the assets found in each state are administered in that state. Thus, if a creditor by simple contract debt lives and dies in one state, and the debtor lives in another, and administration is taken out in both states, the debt is assets where the debtor resides, and a payment to the administrator appointed in that state will be a good discharge everywhere. Should an administrator pay a debt in one state, he would be allowed the credit in his accounts though the debt accrued in another state.

In cases where there is only one administration, and that is at the domicile of the testator or intestate, and the estate consists of property lying in several states, it is not improper

for the executor or administrator to include this property in his inventory, and he then becomes bound to account for it in the course of his administration, since the property may be received by him without suit and in such case he is in receipt of it as part of the estate. However, if there is another administration already covering those assets, as has been said, he should not inventory them, and is not bound to account for them.

In a case in Pennsylvania where there was administration taken in Pennsylvania and New York by the same administrator, a resident of Pennsylvania, upon the estate of a resident of Pennsylvania, and there existed a mortgage on land in New Jersey, which came into the hands of the administrator in Pennsylvania, it was held that it was improper for him to carry it to the inventory of the New York property, but he should have scheduled it as part of the Pennsylvania estate.

Reverting again to general executors and administrators, they are required before entering upon the duties of their office to take an oath, usually prescribed by statute. Such an oath is to the effect that the duties will be faithfully and honestly performed and the estate distributed according to law.

The Question of Bond.

Ordinarily only foreign executors are required to furnish bond, but in the case of administrators it is provided by statute in a majority of states that before letters are granted or any duties assumed a bond must be given with sufficient sureties to secure the proper performance of such duties. A non-resident executor may be compelled to give bond, but a resident executor can claim appointment without giving bond. If, after his appointment, an executor becomes guilty of mismangement of the estate, or wastes it after his appointment, bond may be required of him to protect those interested in the estate. It is usually provided by statutes that the appointment is void if the bond is not given within the time required by law. If a bond is given which is irregular or insufficient, the effect upon the appointment is the same. Thus it has been held that taking a bond with one surety when two or more are required invalidates the appointment. The amount of the penalty of an executor's or administrator's bond is usually regulated by statute, being as a general rule double the estimated value of the personalty. Many states have made provision by statute that if the testator or all parties interested in the estate expressly so request, the executor or administrator may be exempted from giving a bond or sureties

on his bond; but all creditors and guardians of minors should first be notified and given a hearing and the court may subsequently require a bond with sureties, if it thinks such security necessary. Upon filing the bond, and taking the oath of office, letters of administration will then be granted either testamentary or of administration, as the case may be. Short certificates are given by the register of wills to the party so qualifying, to indicate the power of the person named therein to represent the estate.

The next important duty imposed upon an executor or administrator is to prepare and file an inventory of the decedent's estate, the main features of which are a list of the real and personal estate and appraisal or estimate of the value thereof made by disinterested appraisers.

It is provided that executors and administrators shall, within a specified time from the time administration is granted, make a true and perfect inventory of all goods, chattels and credits of the deceased, as far as they may know or can ascertain them, and to exhibit the same in the office of the register of wills. The time after appointment within which an inventory and appraisement should be made and filed is regulated by statutes which vary in minor details in different jurisdictions.

Failure to file an inventory within the time specified is a technical breach of the administration bond, but may be generally cured by filing such inventory when ordered by the court. But if, on being cited to file an inventory, any delay or backwardness occurs, the courts view such actions with suspicion. If no property belonging to the estate of the deceased comes into the hands or knowledge of the executor or administrator, the fact that he has disposed of it all does not release him from the duty of filing an inventory.

All bonds, notes and other evidences of debt, also all other claims and demands for money, or any other personal property owned or held by the decedent at the time of his decease, shall, as far as the same may be known to his executors or administrators, be included in the inventory made.

Where an executor or administrator fails to file an inventory and appraisement as required by law, upon presentation of a petition setting forth the facts the register of wills of the proper county will issue a citation to such executor or administrator, to show cause why he should not do so.

A testamentary provision that no inventory and appraisement need be filed is usually disregarded by the courts in a majority of jurisdictions, although an executor will not be required to file an inventory except as to the personalty where

the will leaves it to his discretion and makes his appraisements final. Even the fact that all personal property of the decedent or its proceeds have been disposed of in the payment of debts does not render an inventory unnecessary, nor is it sufficient to excuse the filing of an inventory that the representative professes to have a large surplus over all debts and offers to deposit security sufficient to pay any debt which may be established. But an inventory may be dispensed with where all the parties in interest waive it and is unnecessary where no assets or estate have come within the representative's possession or charge. An inventory and account may also be dispensed with if not applied for until after so long a period that the lapse of time, in conjunction with other circumstances, affords a reasonable presumption that there were no assets or that the estate has been fully administered, nor is the court required to order an inventory and account where it appears that the estate was duly settled and distributed among the persons entitled without any proceedings in court.

Upon receiving their appointment, executors and administrators are required by the statutes of most states to advertise this fact, requesting all persons indebted to the estate to make payment and those having claims against the estate to present same. The importance of this notice relates mainly to the claims of creditors against the estate. Having published this notice, the executor or administrator is relieved from personal liability if he distributes the assets among those who have duly presented their claims, but notice so to do must be given to all. Furthermore, if an executor or administrator who has given public notice of his appointment does not within a limited time from the notice of his appointment receive from creditors demands against the estate which authorize him to declare the estate insolvent, he may, without personal liability, pay out the estate to the creditors. After the expiration of that time, if the payment is made before he has actual notice of any other claim, and if he does not wholly pay the estate but has not enough left to answer such other claims, he may satisfy that so far as he can, and shall be discharged from further liability. However, if two or more of such claims are presented, and he has not enough assets to satisfy them, he must declare the estate insolvent. It is obvious from what has just been stated that this notice is intended for the protection of the executor or administrator from personal liability in distributing the estate.

At this point and before proceeding further with the rights and duties of the personal representatives of a decedent, it will be well to comment briefly upon the law governing joint executors and administrators.

Joint Executors and Administrators.

The interest of two or more joint executors or administrators in the estate over which they are appointed is joint and entire, and the executors and administrators are considered as one individual. Each of the executors or administrators is entitled to the possession of all the personal property, and if one has actual possession of any of the personal estate, he is entitled to retain it, as against his co-executor or co-administrator.

This interest between joint personal representatives is of such a nature that no partition can be made among them, for each owns the whole, thereby differing from ordinary joint tenants, who own only a partial interest, although possessed jointly. And since each of the joint executors and administrators owns the whole interest in the personal property, it follows that if either grants his share in the estate to a third person, he grants the whole estate. Likewise if one releases his interest to the other nothing passes, because both owned the whole before. While, however, the interest is different in the above respect from the ordinary interest of joint tenants, yet it is in other respect like that interest. The rule as to survivorship among joint tenants applies to the interests of joint executors and administrators, and if either dies, his interest passes to the survivor or survivors.

Since the executors and administrators are thus considered as one individual, if one of them takes possession of the estate, or any portion thereof, that possession inures to the benefit of all. All contracts which were made with the deceased must be sued or defended by all the executors or administrators, since all of them collectively represent the deceased and not any of them individually. As the executors or administrators are regarded as one person, any one may act alone in regard to the personal estate. The administration of the estate may, therefore, be wholly carried on by one, and he may perform all the acts necessary to such administration. Thus, one of several co-executors or co-administrators may assign or sell a promissory note payable to the testator. So one may release a debt due to the estate or accept payment of a promissory note and give a valid receipt and discharge therefor. One of several co-executors or co-administrators may settle an account with one who has had dealings with the estate. On the same principle it is held that one of several executors or administrators may assign or release a mortgage. But as an executor or administrator cannot put any new obligation on the estate, but can only bind himself personally, he cannot bind his co-executors or co-administrators by any contract he may make, without ratification on their part. For example,

if he borrows money for the estate he alone is responsible and neither the estate nor his co-executors or co-administrators are liable.

The liability of joint executors and administrators is limited to such portion of the estate as has come into their possession, or for acts of negligence or fraud of the co-executor or co-administrator which he knew of and assented to. This liability is extended in case all sign a joint bond, and the liability of each is then for the administration of the whole estate.

An executor or administrator cannot delegate his authority and thus avoid any of the liabilities or escape any of the duties imposed on him by law. He may, when necessary, employ and pay agents of his own, such as professional counsel, collectors, bookkeepers, etc., who respond to him alone for their acts, and for whose acts he as principal must answer.

It is the duty of the personal representative to include in his inventory all property to or claimed by the decedent or his estate which has come to the representative's knowledge, but property held in trust by the decedent need not be inventoried. There has been considerable discussion whether the inventory should include property outside of the state or country where the executor or administrator is appointed. The general rule is to the effect that the inventory should properly include assets in another state, unless they are in a state where administration has already been granted, the plan being to have all the assets of the estate covered by some regular administration.

Appraisement.

Every executor or administrator shall cause a just appraisement to be made of the goods, chattels and credits of the decedent by two appraisers. The result of the appraisement is only an approximation to the real value and does not bind anybody. In valuing the property the appraisers should take the value as of the time of the appraisement. For instance, bonds and negotiable securities should be appraised at their market value, not at their face or nominal value. The appraisement is noted upon the inventory blank which accompanies the order, and the schedules filled up, and the document when completed is delivered to the executor or administrator, by whom it must be returned to the orphans' court for record.

The bulk of the estate of a decedent which is to be administered generally consists of the ordinary personal property of every-day life. Household furniture, clothing, money, and sometimes bonds, stock, notes, carriages and other forms of personal

property will be found to form a large part of it. In farming communities, the farm tools and implements; in business centers, the stock and merchandise, will enter into the estate. Few questions arise as to the fact of these kinds of property being assets of the estate. There are, however, two points to be noted: First, that some chattels may be so affixed to realty as to become part of it, and then do not form part of the personal estate; second, that only property which was owned by the deceased at the time of his death forms his estate.

When personal property is affixed to realty it is called a fixture. Technically speaking, fixtures are those personal chattels which have been annexed to land, and which may afterwards be severed and removed by the party who has annexed them, against the will of the owner of the land. But the term "fixtures" is commonly used to include those chattels which become part of the realty, and cannot be removed, as well as those which may be removed. The general rule is that whatever is affixed to the realty is thereby made part of it, and partakes of its incidents and properties. The effect of this rule on chattels affixed to the realty, as regards the right of the executor or administrator and heir or devisee, and the remainderman or reversioner, we will now proceed to examine.

A chattel, in order to become a part of the realty, must be in some way actually affixed to the land or house or other part of the realty. It is not sufficient that it be merely laid upon the ground or brought into contact with it. Thus fence rails laid in piles upon the ground are personal property, while a fence attached to the land by posts, stakes or otherwise, is part of the realty. For the same reason it has been held that where a tenant built a barn, and put it upon blocks of wood resting on the ground and not inserted in the ground or in any way fastened to it, the barn remained personal property and the tenant might remove it. The rule may be stated as follows: If the chattel is so affixed to the realty that it cannot be removed therefrom without serious injury thereto it becomes and is to be regarded as part of the realty.

By far the greater number of cases which arise on this point are those in which the chattel in question is affixed in some manner to the realty or to some portion thereof, but not in such a manner that great damage would be done to the realty if the chattel were removed. In such cases the intention of the party affixing it, as shown by the various circumstances of the case, viz., the manner of affixing it, the purpose for which the chattel is to be used, the purpose for which the building is used, and the

like, governs the decision in each case. If the chattel is affixed to the realty merely for the better use of the chattel, as, for instance, when a carpet is attached to a floor by tacks, it remains personalty. But chattels which are affixed to the realty for the better and more convenient use of the building for the purpose to which it is specially adapted are considered part of the realty. Thus, when a building is built for and specially adapted to use as a mill, the water wheel, millstones and running gear are part of the realty.

In considering the relation of the person affixing the chattel to the realty, it is important to notice the different rules which the courts have laid down as to the rights of the executor or administrator of the owner in fee, the owner for life and the tenant for years. The law looks with strictness upon the right of the executor or administrator of the owner of land in fee, as against the heir of such owner, for the principle of the law is that the inheritance should be allowed to descend to the heir unimpaired, whereas, as between the executors or administrators of a tenant for years and the owner of the land in fee, the law looks with somewhat more favor on the rights of the executors or administrators. The reason for the difference is that the tenant for years, knowing his interest in the estate to be limited, is not presumed to have intended to enrich the estate permanently and therefore the law would require such an intention to be shown more clearly than in case of the heir. An exception to the strictness with which the law regards the executor or administrator, as against the heir, exists in case of fixtures put up in a dwelling house for ornament or convenience. These may be removed by the executor or administrator if it can be done without substantial injury to the realty.

As between the executor or administrator and the devisee, the rule is even more strict against the executor than as between him and the heir, since it is presumed that the testator intended to grant the full enjoyment of the land devised, and, therefore, if there is any question, the presumption is in favor of the devisee. As between the executor or administrator of the tenant for life and a remainderman or reversioner, the rule is more relaxed in favor of the executor or administrator and particularly in regard to trade fixtures, which probably would go to the executor or administrator unless so affixed to the freehold that substantial injury would be done by removing them.

Mention has already been made that only those chattels are assets of the estate of a decedent in which he had ownership at the time of his death. The money due on an insurance policy on

the life of the deceased is an asset of the estate, if this policy was payable to the deceased or his representatives, but if payable to others it is not. A policy payable to the deceased, "his executors, administrators or assigns," for the benefit of others, is not, strictly speaking, assets, but the executor holds same in trust for the beneficiaries. A policy on another's life is assets, if payable to the deceased.

Dividends on stock generally belong to the person who owns the stock when the dividends are declared, and not to the executor or administrator of a prior holder of the stock while the dividend was being earned. However, if one has a limited interest, as where one has a life interest in stock of a manufacturing company, a dividend wholly earned before his death, but not declared till after his death, will go to his executor or administrator, as being part of his life interest, and not to the subsequent owner of the stock. There is some diversity of opinion on this point. Interest on money goes to the executor or administrator up to the time when the decedent died, even though it is payable half-yearly or at other definite times. Interests in patents and copyrights vest in the executor or administrator, and the executor or administrator may make application for a patent covering an invention of the decedent. The same principle applies to a trade secret or process which one has discovered and kept secret, whether patentable or not, if the person about to use it will by so doing violate any contract or be guilty of a breach of good faith. The contract right in such case survives to the executor or administrator, and he may bring a bill for an injunction. Likewise a pension from the government payable to the widow, who dies before it is paid, should be paid to her executor or administrator, and not to the children.

As incidental to the duty of the personal representatives to collect the assets of a decedent's estate, the executor or administrator has the right to compromise any demand of the decedent, provided he acts honestly and within the range of a reasonable discretion for the true interests of the estate. The duty of the personal representative to collect debts due the estate of his decedent is not changed by the fact that he is a debtor. He must, if solvent or able to pay, pay the debt and account for the amount thereof as assets. He is not debarred, however, from showing that the claim against him is unfounded or unjust or has been paid, and he may also return the debt as uncollectable when the facts warrant this to be done.

Assets of the Estate.

It is a primary duty of the executor or administrator to collect the assets of the estate of the deceased for the benefit both

of the creditors of the estate and the next of kin or legatees. In general he has the right to and should take into his possession or custody all personal chattels even though specifically bequeathed, and proceed to collect all debts or claims due the estate. Whenever assets come into the possession or knowledge of the personal representatives, they become liable to account for the same satisfactorily or else stand chargeable with their full value. So far as land and other real property of the deceased is concerned, the personal representatives have no interest as a general rule, except so far as it may be given by statute, or in case of an executor, by the will of the deceased. The executor or administrator may with the consent of the heirs occupy the land, but then becomes liable to them for the rents and profits, but not as assets which creditors can reach.

Another interest in the real estate of a decedent which is conferred by statute upon the executor or administrator is the power to sell the same for the payment of debts. This power gives the executor or administrator no estate in the land, and is a mere power only to be exercised by leave of the court. An executor or administrator sometimes takes land on execution for debts due the estate. In such a case the land belongs to the personal estate and is to be accounted for as such. The executor or administrator holds the legal title in such lands in trust for creditors, distributees and legatees, and may, therefore, maintain actions for trespass on the land, or may recover possession of it until distribution and partition are made.

Profits realized from lands which have been bought with partnership funds, and are held for partnership purposes, are considered to be personal estate, until the dissolution of the partnership, and go as such to the executor or administrator; but the land upon such dissolution resumes its character of real estate, and descends to the heirs. Rents which accrue after the death of the lessor (decedent) go to the heir. Rent which accrues before the death of decedent goes to the administrator or executor and the right to sue for it is in the personal representatives.

Safe-Keeping of Estate Funds.

The executor or administrator, for the purpose of safely keeping the funds of the estate during administration, should deposit the same in a bank, but the deposit should properly be made with a designation of his trust or fiduciary capacity. If the funds are so deposited, and due care is used in selecting the depository, the executor or administrator is not responsible for a

loss resulting from the subsequent failure of the bank, the test being whether he has exercised such prudence as men of average intelligence ordinarily exercise in their own affairs. For example, in a recent case a trust company was appointed administrator, and as such it became liable to deposit the funds of an estate in a bank. It was held guilty of negligence in depositing them in an insolvent bank, and therefore liable for loss resulting therefrom, where its president had actual knowledge at the time of the insolvent condition of the bank of deposit, and its officers whose duty it was to look after deposits of trust accounts had heard rumors sufficient to put them on inquiry, which, if made, would have revealed to them the true condition of the bank. And in view of these facts, the fact that the clerk of the trust company having immediate charge of the deposits acted in good faith, believing the bank to be solvent, did not exonerate the company, nor was the trust company authorized to rely on the general reputation of the bank, where its president was also president of the bank and thus had the means at hand, coupled with the duty, to acquaint himself with its condition. This rule, of course, applies with equal force to individuals.

The general rule is that neither an executor nor an administrator is justified in placing or leaving assets in trade, for this is regarded as a hazardous use to permit of trust money. It is a great breach of trust for an executor or administrator to engage in business with the funds of the estate, and consequently the law charges him with all the losses thereby incurred, without, on the other hand, allowing him to receive the benefit of any profits that he may make, the rule being that the persons beneficially interested in the estate may either hold the personal representative liable for the amount so used, with interest, or, at their election, take all the profits which the representative has made by such unauthorized use of the funds of the estate.

As an apparent exception to the above-stated rule, the personal representative may continue the business of the decedent so far as is necessary for the purpose of winding up the same and converting the assets into money, or carrying out existing contracts of decedent. A testator frequently authorizes his executor to carry on his business, usually providing the conditions under which this shall be done. Now, it has been decided by the courts that where the personal representative is authorized to carry on the business of the decedent the debts incurred in so doing are chargeable against the estate and not against the personal representative individually.

Carrying on a Business of Decedent.

In cases where an executor is authorized to carry on the decedent's business after his death, only such assets of the estate as are invested in the business at the time of the decedent's death can be considered as trade assets, and, in the absence of some clear authority in the will, the other property of the estate cannot be subjected to the risks of trade or be made liable for debts contracted by the representative in carrying on the business. A claim that an executor, carrying on the business of his testator under the will, made fraudulent representations as to the value of the estate in order to obtain credit, gives no right of action against the estate, but only against the executor personally. Where an executor is given "full power" to conduct the business in which testator was engaged, he may carry on all testator's business interests and in doing so is not limited to capital invested in the business.

Unless the creditors existing at the death of the decedent in some way consent to the carrying on of the business by the executor, they have the right to insist that the estate, as it existed at decedent's death, shall be used for the payment of their debts and the expenses of administration to the exclusion of debts subsequently created by the executors. But if the business was carried on by the executor with the consent of the original creditors, the creditors of the business must either share *pro rata* with the other creditors in the whole estate (which is doubtless the correct rule) or be first paid out of the portion of the estate used in the business.

The personal representative of a decedent has, as a rule, no more right to continue in a business in which the decedent was a partner than he has to continue a business in which the decedent was sole proprietor. The executor of a deceased co-partner may continue the business where the will directs him to do so, and the liability of a deceased co-partner as well as his interest in the profits of the concern may by the co-partnership contract be continued beyond his death, although in the absence of such a stipulation the death of one of the partners would dissolve the firm, even though the co-partnership was expressed to be for a term of years. With such a contract, the effect must naturally be to bind the estate of the deceased partner in the hands of his executor or administrator without compelling such representative to become a partner personally. This is one of the objections to a co-partnership arrangement, which is overcome by incorporating.

A settlement of partnership affairs made with the surviving partners by the personal representative of a deceased partner is

binding on the latter's estate, its creditors and beneficiaries, except in cases of fraud or mistake, and for only the share thus received is the personal representative liable to account.

In making investments of the funds of the estates, the personal representative acts as trustee rather than as executor or administrator, and his duties and liabilities in respect to such investments are governed by the same rules as apply to other trustees. If the will contains directions as to the investments to be made, these must be followed. Ordinarily investments are restricted to real estate, government and municipal bonds, and if the executor or administrator has any doubt as to the wisdom of any investment, it is the part of wisdom for him to obtain the sanction of the court before making the investment, in order to avoid any possible effort being made to hold him personally responsible. The personal representative of an estate is liable for all losses sustained by virtue of unauthorized or improper investments. An executor or administrator who fails to invest or deposit funds as required is chargeable with interest thereon.

It is a fundamental principle of the law on this subject that an executor or administrator will not be allowed to acquire individual interests inconsistent with the representative capacity he sustains for the benefit of the estate, nor to make a personal profit out of his dealings with the property of the estate. Transactions in which the representative as an individual deals with himself in his representative capacity are always regarded with suspicion and will be set aside if inequitable. Hence, while his general right to dispose of assets is conceded, an executor or administrator should not purchase or speculate with property of the estate for his individual benefit, divert the funds of the estate into business or investments for his own private gain, buy out for himself his decedent's share in a partnership or sell his own property to the estate.

The representative's sale of assets or other transactions made for other purposes than the due discharge of his duty as executor or administrator will not be sustained against the interests of the estate, where the person with whom he dealt had notice of his bad faith or breach of trust, and in such case the transaction may be set aside and restitution enforced. However, a third person who in dealing with such representative acted in good faith, and has paid a consideration, will be protected in the transaction.

Executors and administrators are not insurers, nor will they be chargeable with the loss or depreciation of assets where they have acted in good faith in the care and management of the

estate. The estate of a decedent is not liable for the fraud, false representations or misconduct of an executor or administrator, but the personal representative who practices such fraud will be answerable personally therefor to the injured person.

Sales of Personal Property.

The personal estate of a decedent vests in the executor or administrator, as we have already pointed out. The executor or administrator is charged with the duty of paying the debts of the intestate, and to accomplish this object he has the power to sell the personal estate at any time, provided the sale is *bona fide* and without fraud. In some states an order of court is required to authorize a sale. The power to sell personal property includes the power to sell chattel interests in land, such as leases for terms of years, mortgages, etc. As auxiliary to the power of sale of personal property owned by the executor or administrator, his power is extended to endorsing bills of exchange or promissory notes of the deceased, with the same effect as if the endorsement had been made by the deceased himself.

A mortgage before foreclosure, being considered personal property of the mortgagee, may be sold by his executor or administrator and assigned by him, without an order of court except as this may be required by statute. After foreclosure the mortgage interest becomes real property and cannot be sold without the sanction of the court. The power of an executor or administrator to dispose of the personal property of the decedent is held by high authority to include the power to mortgage the assets in order to raise money for the purposes of administration. In Pennsylvania a chattel mortgage is not recognized as possessing any validity. The power of the executor or administrator to sell personal property includes the power to pledge the assets to raise money, and the pledgee may sell if the pledged property is not redeemed.

Interests in Real Estate.

The personal representatives of a decedent cannot, by virtue of their office, occupy and lease land or receive the rents and profits thereof accruing after the death of decedent. All rights and profits connected with the realty belong to the heirs or devisees. The powers of an executor or administrator relating to land are limited to the application for and proper execution of an order of sale when this is necessary to pay debts. When an executor or administrator ascertains that the personalty is insufficient to pay the debts it is his duty to present a petition for leave to sell real

estate, or if such power is conferred by the will, he should exercise it for the benefit of creditors. The circumstances under which leave will be granted to sell real estate are so numerous and involve such technicalities that it would not be in conformity with the spirit of these articles to discuss same in detail. Whenever it becomes necessary for an executor or administrator to obtain leave of court to sell real estate, it is imperative that an attorney be employed, our purpose being limited to an analysis of only such general principles of law as would be of interest and value to the average business layman, that he may be guided without the services of an attorney.

The personal representative of a decedent has at common law no title or right to the rents and profits of the real estate of his decedent accruing after the latter's death, but possession and control of real estate such as will carry the right to rents and profits may be given to the executor or administrator by the will, and statutes frequently give the representative the right, under appropriate circumstances, to receive the rents and profits, either for the purpose of using them for payment of the debts or for other proper purposes connected with the administration. The representative who has collected rents may be protected where, instead of paying the same over to the heirs or other distributees, he has under prudent and reasonable circumstances applied the same beneficially for the premises, as in keeping down mortgage interest and preventing foreclosure at a sacrifice, or for keeping the buildings in proper repair. It has been decided that an administrator has no authority to apply rents collected to taxes and arrears of ground rent accruing subsequent to the death of the decedent. The court has also refused to call a widow who was administratrix to account for rents and profits expended in the support of infant children of the deceased.

As a general rule of law, an executor or administrator who has taken possession or control of the real estate of his decedent must account for the rents and profits thereof. He is not responsible for rents for a time when the real estate was not in his possession or control unless he has been guilty of some lack of good faith which has resulted in a loss to those entitled to the rents.

The common-law rule that the personal property is the primary fund for payment of the decedent's personal debts, to the exemption of the realty, has been extended so far as to allow the heir or devisee to call upon the executor or administrator to exonerate the realty from a debt constituting a lien thereon, unless

the testator has expressed his intention to the contrary in plain terms. However, the rule relates only to personal debts of the decedent, and if the decedent acquired land already subject to a mortgage the representative cannot be called upon to discharge it unless the decedent made the debt his own or directed by will that his personal estate should discharge the lien.

In view of the fact that a lease of lands is a chattel interest going to the personal representative as assets, it is the duty of the personal representative to perform the contract, and he is liable for a breach of it, while on the other hand he may maintain ejectment with relation to the leased lands.

Priority of Debts.

We have noted the fact that a personal representative of a decedent must, upon qualifying as such, make an inventory and appraisement of the assets, advertise his appointment and apply the assets to the payment of decedent's debts, after which distribution must be made in accordance with the will or the intestate laws, as the case may be. It is most important to understand the order in which the debts of a decedent must be paid by the executor or administrator, which we will next proceed to outline.

The order of priority of payment of debts is settled by statute in a majority of states, to which reference must be made by the executor or administrator to determine upon his proper course of action.

Widow's Exemption.

A portion of the husband's estate is given by statute in most states for the immediate support of the widow and children after the husband's death. This portion is called the widow's allowance or exemption, and generally consists of a certain quantity of provisions and a certain amount of property up to a limited value. This allowance either takes precedence of all debts and charges upon the estate, or ranks immediately after the expenses of last illness and funeral. Upon presentation of such a claim by the widow or children of a decedent it becomes the duty of the executor or administrator to have the property to be exempt appraised. The widow must present her claim within a reasonable time and the appraisement must be made as soon as possible.

It is evident that the amount which should properly be allowed by the court for the funeral expenses of the deceased must vary greatly with the condition of his estate, for expenses which might be proper and suitable if the estate is solvent would clearly be unsuitable if the estate was insolvent, as they would diminish the

fund from which the payment of debts is to be made. Necessary items of expenses are coffin, shroud, hearse and undertaker's fees, and these would be allowed even if the estate were insolvent. If the deceased died away from home the expense of transportation to his home and of a person to attend such transportation has been held a necessary one. Expenses of entertaining guests at a funeral have been held not to be necessary as part of the funeral expenses in case of an insolvent estate. There is some conflict of authority as to whether the expense of a gravestone is necessary so as to give it priority as part of the funeral expenses.

If the executor or administrator orders the funeral and interment, or if he ratifies or adopts the acts of another he is personally liable for these expenses. If he is compelled to pay these expenses he must look to the estate for his remuneration. He would have, in such case, a preferred claim upon the assets of the estate.

With reference to expenses incident to last illness, whether the expenses claimed were incurred during the last illness of the deceased is a question of fact to be decided by a jury in case of dispute. Any illness terminating in death may be regarded as a last illness in this connection. All sums paid for the expenses of the last illness are of equal degree and should be paid ratably in case of a deficiency of assets. In New Jersey it has been held that the physician's bill should be paid before the funeral expenses.

A claim for services rendered to the decedent may be allowed against his estate, whether such services were rendered upon an express contract for a fixed payment, or without any such contract, but with the expectation of reasonable compensation therefor. Failure to demand payment during the decedent's lifetime will not necessarily defeat a claim against his estate for valuable services performed at his request. The courts regard with suspicion and disfavor claims brought against a decedent's estate for personal services rendered by relatives, especially where the latter are members of his immediate family or household, as the presumption is that such persons would render such services gratuitously. Consequently claims against the estate of a decedent made by near relatives for personal services require stronger proof to establish them than ordinary claims made by strangers.

Lien of Decedent's Debts.

The lien of a decedent's debts is regulated by statute differing naturally in different states.

The executor or administrator is neither bound nor allowed to pay any claims which are not valid, legal debts of the estate. Claims barred by the Statute of Limitations should not be recog-

nized by the executor or administrator. All the simple contract debts of the deceased generally rank alike, and in case of insolvency each takes the same proportion as the others. If the executor or administrator exhausts the estate by paying the preferred debts, this prevents the common debts from recovering anything, either against the estate or the executor or administrator personally, and the same is true of a lower class of preferred debts if the estate is exhausted in paying a higher class of debts.

The legitimate expenses of administration are to be met out of the assets of the estate, but the proper mode of doing this is for the representative to make the necessary disbursements, for which he will be allowed credit in his accounts rather than by allowing such expenses as a direct charge against the estate, as the expenses of administration are not debts of the decedent.

The costs of administration include all expenditures which an executor or administrator is obliged to pay out for the due administration of the estate, such as expenses of probating the will and securing a decree of appointment, costs of suit brought by or against him in defense of the estate, costs of proceedings proper to the settlement of the estate in the orphans' court, and the like. Costs of administration are generally preferred over the payment of other debts, second only to the funeral expenses and costs of last illness.

Inheritance Taxes.

Nearly all the states have now passed laws providing for an inheritance tax on the value of an estate which passes under a will or by inheritance. These taxes in most states are construed to be a tax against the beneficiary and unless otherwise provided in the will are to be paid by the beneficiary.

Most states make the tax less against direct heirs than against collateral heirs. Direct heirs are husband or wife, children, grandchildren, parents and direct issue. Collateral heirs are brothers and sisters, uncles, aunts, nephews and nieces and all other next of kin.

Generally, the state of the decedent's domicile taxes all of the property of which the decedent dies possessed. One exception to this rule, however, is the proceeds of life insurance policies. Most of the states exempt from all tax the proceeds of life insurance policies if such policies are payable to a beneficiary other than the estate of the decedent. Proceeds of life insurance to the extent of $40,000 is also exempt from the Federal Succession tax. Bequests to charitable institutions or for charitable purposes are also generally exempt from state and federal inheritance taxes.

Under the inheritance tax laws of the various states, real and personal property situate in states other than the state in which the decedent was domiciled at the time of his death, has been heretofore generally taxable by the state in which such property was situated, as well as by the state where the decedent was domiciled. Recently many of the states have adopted laws providing against duplication of taxes upon intangible personal property, such as stocks, by what are known as "Reciprocity Laws," whereby the states having such laws do not tax intangible personal property of a non-resident decedent who was a resident at the time of his death of a state which also has such a law in force.

As of 1931, Alabama, District of Columbia, Florida and Nevada, do not have any Inheritance Tax laws in force. Colorado, Delaware, Maryland, Massachusetts, New Jersey, Rhode Island, Tennessee, Vermont and Virginia, do not tax intangible property of a non-resident decedent. The following states have adopted "Reciprocity Laws," relating to inheritance or succession taxes: California, Illinois, Iowa, Michigan, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, and Wyoming. There is a growing tendency in other states to enact similar legislation.

All estates over one hundred thousand dollars ($100,000) are subject to the Federal Succession tax and this tax it is also the duty of the executor or administrator to declare and pay. The executor or administrator should, within sixty days after the death of the decedent, file a notice with the Collector of Internal Revenue of his district, giving general details of the estate, and later, but within one year from the date of death, file a specific and complete return of the entire estate, and pay the tax.

Executors and administrators, being obliged by law to pay the inheritance taxes due to the various states and the Succession tax due to the United States from the persons benefiting under the estate should consult either an attorney or the proper officer of such states as may be entitled to a tax (usually the Register of Wills of the county in which the decedent was domiciled at the time of his death and the state inheritance tax departments of any other states) and obtain the proper forms to be filled out and sworn to in order to declare the tax and have it assessed. If the gross amount of the estate exceeds $100,000, the Collector of Internal Revenue of the district in which the decedent was domiciled should also be consulted as soon as possible after the appointment of the executor or administrator, and the proper forms obtained from him in order to declare and pay any Federal Succession tax that may be due.

Presentation of Claims.

It is the duty of the executor or administrator to advertise the granting of letters to him, so as to give notice to creditors of the estate to present their claims. All claims should be presented to the executor or administrator immediately upon receiving notice of their appointment. According to the weight of authority knowledge on the part of an executor or administrator of the existence of a debt or claim against the estate is not sufficient to dispense with the necessity of presentation. A debt which is not due at the time of proving claims but is payable absolutely at a definite time in the future, may be proved as a claim against the estate and funds retained to meet it.

Disputed Claims.

The personal representative of a decedent may contest any claim which in his opinion ought not to be allowed against the estate, and any person having an interest in the estate adverse to the allowance of the claim may contest it. Heirs and distributees may contest the allowance of the claims of creditors, or of the representative; and one creditor may contest the claims of other creditors provided the assets are insufficient to pay the claims of all.

It is the duty of the representative to contest all claims presented against the estate which he believes are unfounded or unjust, and which are not presented and authenticated according to the requirements of the statute. But the propriety of contesting particular claims must frequently be left largely to the representative's discretion and no presumption of bad faith or misconduct will be made against him. Objections to a claim may be based on a denial of its justice or validity, or may rest on the ground that the claim is barred, or that the claimant has not complied with the statutory requirements as to its presentation and authentication. But it is not a valid objection to the claim of a creditor that a similar demand has been presented against another estate, or to the claim of a representative that he has not filed his bond.

Insolvent Estates.

In pursuance of the general plan which is adopted in a majority of the states, of gathering in all claims against an estate, and paying them all at the same time, so far as may be, and in the same proportion, if the assets are not enough for all, there are enacted in most states statutes which exempt an executor or administrator from liability to suit for a given time in order

that he may have an opportunity to collect the claims against the estate, and get an idea of whether the estate is solvent or not. The executor or administrator, having thus collected the assets and the claims against the estate, may decide whether or not the estate is insolvent. As soon as the debts which the executor or administrator recognizes as valid exceed the assets which he has in possession or control, the estate is insolvent, and must be treated as such. Often this question cannot be determined until the time for filing the claim has expired, for although the assets may seem sufficient up to the time, yet at the last moment claims may be filed which will render the estate insolvent. The question of whether or not an estate is insolvent when there are assets in several jurisdictions and ancillary administrations is one of some difficulty. It has been decided that the safest rule is that each jurisdiction should decide the question upon the debts proved before it, and the assets in its hands. In deciding whether or not the estate is insolvent only valid claims can be considered. Thus debts barred by the Statute of Limitations must be rejected.

If the claims of partnership creditors, together with those of the separate creditors, make up a sum greater than the total assets of an estate, including the share of the partnership asset which belong to the estate, each class of claims must be primarily remitted to its own class for payment, and can come upon the other only after the latter debts have been satisfied. This rule arises from the fact that the separate creditors of the deceased have no claims upon the assets of the estate until all the firm debts are paid, since the only assets of the estate of the deceased arising from the partnership funds are the surplus of such funds over partnership debts. And conversely, the partnership debts are to be satisfied out of partnership assets, and can only come upon the separate estate after the separate creditors have been satisfied in accordance with the established bankruptcy laws. Thus in settling an insolvent estate of a deceased partner, if both individual and co-partnership claims are proved against the estate, two lists of claims are made, and the partnership estate is distributed among the partnership creditors and the separate estate among the separate creditors.

If the deceased partner owed the firm, and his estate is insolvent, as well as the surviving partner, the estate is liable to make good the amount which the deceased partner equitably owed the living partner as an individual. This is one-half (if the shares of each partner in the partnership are equal) of what he owed the firm; that is, the living partner comes in as an individual creditor of the estate. To this extent only can the surviving partner or

his creditors reach the individual assets of the estate. When, however, there is no joint or partnership estate at the death of the partner, and there is no solvent partner, it is held that the firm creditors may come in equally with the separate creditors against the separate estate. The reader is referred to the Uniform Partnership Law analyzed in the Chapter on Partnership, which regulated the rights and liabilities of a deceased partner's personal representatives, etc.

A promissory note given by a personal representative for a debt of his decedent is neither a payment nor an extinguishment of such debt, unless it is shown that the parties intended that it should operate as such. A personal representative has authority to assign bills and notes due to the decedent in satisfaction of debts due by him, but he has no power by assignment or otherwise to appropriate them to the payment of the debt of one creditor to the exclusion of others of equal or higher rank. If a creditor of an estate accepts notes and obligations in favor of an estate as collateral security to collect and apply to his debt, and fails to collect or to show good reason for his failure, he will be charged with the amount of such notes and obligations, and if this amount is equal to his claim against the estate, such claim is extinguished.

Any debt or demand which constitutes a legal set-off for or against a party in his lifetime, if still subsisting at the time of his death, will constitute a good set-off for or against his personal representative, and a personal representative has no right to pay a debt due by the estate which he represents to a person who is himself indebted to the estate, without first having set off the debt due to the estate against that due by the estate.

Filing Accounts.

It is only possible to make a few general observations of this important part of an executor's or an administrator's duty, this subdivision of the general subject under discussion being entirely too comprehensive to treat in detail. An executor or administrator should always keep separate entries of all moneys received and paid entirely distinct from his private account. He should charge himself with the inventory, with any excess of sales or collections above the appraisement, and with all receipts. He should credit himself with all disbursements, he should keep a separate bank account, and on no excuse mingle one dollar of the trust funds with his individual money. He should not borrow or use any portion of the assets, nor lend same to relatives, partners or friends. He should be careful to keep large sums of

money at interest, but always so that there may be no loss. He should, of course, take receipts for all payments. An account must be filed in court within one year, ordinarily from the time the personal representative qualified, and shortly before the year expires, accounts should be prepared and filed and notice thereof sent to all parties in interest. The account should not contain items of distribution, and rents should be excluded from accounts of personalty. The account of principal should be stated by itself and the income account should be separate in all cases where it is necessary. Accounts of the proceeds of sale of real estate must also be separate from the administration account. Dividends upon railroad and bank stock declared since the testator's death belong to the income account.

The following judicial directions may be used as a guide in preparing an account: "The correct form is to charge the accountant (executor or administrator) with the amount of the inventory and appraisement of personal property, and all money received since filing the same, from debts due decedent, not inventoried, together with any excess over the appraised value realized by a sale of the personal property or any portion thereof, and any proper surcharges, either admitted or duly proved. Credit is then to be allowed for preferred debts, expenses of administration, allowance to the widow or children, if claimed, loss upon appraisement by sale, and debts of decedent, if undisputed and estate solvent. The true balance for distribution will thus appear."

When the account is prepared it is filed and advertised and then comes up to be audited before the court. If any party in interest has any objection to the allowance or disallowance of any claim, he should appear at the audit and enter a contest. A day is then fixed by the court when the contested claim will be passed upon. The account, if in proper form, and there being no objections, or if so the same having been decided, is first approved "*nisi*" and, if no further claims or objections are presented against the account, the same is confirmed by the court absolutely, after which distribution of the estate will be made either in accordance with the terms of a will or the intestate laws of the state, as the case may be.

It is the duty of a personal representative, upon the settlement of his decedent's estate, and after payment of debts, to make distribution of the decedent's property, in the manner directed by the will, as in the payment of legacies, or in case of intestacy or as to property not disposed of by the will, in the manner prescribed by statute, upon an order of the court. It is

no part of his duty to partition or convey among heirs or devisees the real estate of his decedent, or to pay legacies charged upon the land unless empowered by the will to do so. The power of making distribution cannot be delegated by the personal representatives to another. After an order of distribution, it is the duty of the personal representative to hold the funds in his hands subject to the order of the court, and to pay them to such parties as the court may direct; further than this he has no standing in court or before an auditor respecting the distribution of the funds in his hands.

In cases where the decedent left a will, the executor, after he has paid all the debts of the estate which have been duly presented to him within the time limited by law, and allowed by him or by the court as valid debts of the estate, must next pay the various legacies which are given by the testator in his will.

The rule that legacies shall only be satisfied and paid after all debts have been paid is one of obvious justice and is recognized in all states. The general subject of the construction of the terms of legacies, the estate given by them, and like questions, belong more properly to the law of wills which has previously been considered, and in the present connection we will confine our inquiry to the several rules which affect the payment of legacies by an executor.

It was long the established rule of courts of equity that when a debtor decedent bequeathed to his creditor a legacy equal to or exceeding the amount of the debt, this bequest should be presumed, in the absence of any contrary intention expressed in or inferable from the will, to be meant by the testator as a payment and satisfaction of the debt. However, this rule has been regarded with disfavor in the recent cases where from any circumstance in the will it might be inferred that the testator had a different intention. So little has this rule been favored by the courts that in one of the more recent cases the court said that if nothing was said on the subject in the will the modern rule of construction would be that a bequest is to be regarded as a bounty and not as the payment of a debt. Slight circumstances in a will are regarded as showing an intent in this regard. Thus, where the testator has left a legacy of less amount than the debt or of a different nature, or not equally beneficial in some particular, it is to be inferred that he did not intend the legacy to operate as payment of the debt. So where the debt was not contracted until after the making of the will it is considered evident that the testator could not have had any intention to satisfy the debt when he made the legacy. The legacy of a specific chattel, however

great its value, is not considered as the satisfaction of a debt unless it is so stated expressly in the will. Regarding the converse of this rule, the effect of a legacy bequeathed to a debtor instead of a creditor of a testator, no presumption of a release or extinguishment of the debt exists, but such intention must be clearly expressed. If a testator does expressly release a debtor from his debt, this release only takes effect subject to the payment of the testator's debts.

There is also in many states a statutory provision by which an executor when paying a legacy may require from the legatee a bond to refund the amount in case subsequent debts appear which are not barred and must be paid. This bond protects the executor in making the payment, and if he pays over the legacy without taking such a bond he is liable to a creditor for the amount of the legacy if the payment was made before the time had elapsed which barred the claim, or if for any reason the claim is not barred by non-presentation or negligence in suit. But the fact that he does not take a refunding bond does not invalidate the title of the legatee to the amount paid him.

At law a legacy, whether specific or general, does not vest in the legatee so as to be subject to his death or to be enforceable by him until it is assented to by the personal representative or at least until it may be seen with reasonable certainty that it will not be needed to pay claims of a higher rank, unless the legacy is charged on the land. In equity, however, the executor is considered as a trustee and may be compelled to give his consent, if he refuses it without just cause. The representative's assent may not be in writing, but may be expressed or implied and may be either shown by direct proof or inferred from circumstances consistent with the intent to render to the legatee or devisee the legal title and control, as where a considerable length of time has elapsed or where the legatee has been in possession for some time with the consent of the representative.

Order of Payment.

If the assets or the estate are not sufficient to pay all the legacies, the order of payment as established by courts of equity is as follows: Specific legacies and devises are to be paid in preference to general legacies and devises, and in the absence of any provisions in the will all the general legacies and devises must abate equally their proportion of the whole amount bequeathed; and annuities, if not payable from any particular funds, stand on the same footing as general legacies.

This rule as to the abatement of legacies is subject to any

expressed intention of the testator in his will, directing the manner or the order of priority in which the various legacies shall abate in case of a deficiency of assets. For instance, a testator may give one general legatee a priority over others. The rule as to abatement is also subject to the further exception that where a legacy is given to one in satisfaction or lieu of some valuable right (for example, where a legacy is in lieu of dower or curtesy) the legatee is deemed a purchaser, and his legacy will not abate until those of beneficiaries of the same class are exhausted. If the assets generally bequeathed are not sufficient to pay all the debts, all the specific legatees must abate their legacies equally, as debts have the prior claim upon the whole estate over all voluntary dispositions. This is upon the theory of law that a man must be just before he is generous.

In a majority of the states the time when legacies may be sued for, and are therefore absolutely payable, is fixed by statute, so that while a legacy may be paid before that time by an executor at his peril, yet he cannot be compelled to pay before that time. In case of a residuary legacy it cannot be known whether the legacy will be valid until it is known whether the debts and other legacies will exhaust the assets. The right of a residuary legatee to the payment of his legacy being so dependent, he cannot bring suit for the payment thereof without showing such facts as justify the payment either of the whole or a part of the residue to him; that is, that the executor has assets not needed to pay debts or the other legacies, and that the payment will not be injurious to the estate. These facts may not arise until long after the end of the time limit fixed by statute for the payment of legacies.

When an executor is also legatee or distributee, no formal act is necessary to vest title to the legacy in him as an individual, and any act on his part showing an intention to retain assets in payment thereof is sufficient. But he cannot without an order of court or a settlement or agreement with his co-legatee or co-distributee retain his legacy or share from the assets of the estate to the exclusion of or in preference to other legatees or creditors, as by applying it to debts due by him to the estate. He cannot transfer to himself as legatee property belonging to the estate before he has settled his administration account and paid the debts and prior legacies due from the estate.

Likewise an executor who is also residuary legatee acquires full title to the residuary assets only when all debts, charges and legacies are paid.

Advances and disbursements made by the representative

for the benefit of legatees are to be reimbursed from their respective shares in the estate; and they should be specially adjusted by the personal representative aside from his ordinary administration accounts, by way of an offset to the amount due from the estate in his hands to the legatee. If the legacy lapses in interest after the advances have been made the representative may recover them by an action in his own right as for money had and received.

Payment of Legacies.

In the payment of legacies the executor acts at his own peril unless he is acting under an order of the court, and he must decide to whom legacies are to be paid. It is not in every case sufficient to pay the legacy to the person named or described in the will as legatee, for he may be under some disability. For example, if the legatee is an infant, the legacy cannot be paid to him nor to his father or any relative, for the proper person to whom such payment is to be made is a guardian duly appointed, and the same rule is true in the case of other persons under guardianship, such as lunatics, spendthrifts and the like. In this connection it is important to bear in mind that a guardian or trustee appointed in one state is not entitled to receive the payment of a legacy in another where the estate is being administered, but there should be a guardian duly appointed and given proper security in the latter state.

When a legacy is given generally to one for life and to others upon his death, the legacy should be paid to the legatee without requiring any security from him to secure the estate from waste in his hands, unless there appears to be danger of his wasting or removing the property. If the legacy is a specific legacy for life to one, and absolutely after the life estate to another, and the executor delivers it to the life tenant, and takes a proper receipt or inventory for the remainderman, he is discharged from further liability. In case the legatee has died, the legacy is payable to his administrator or executor. A legacy is liable to attachment or to trustee or garnishee process at any time after the interest in it has vested in the legatee. Therefore, when an executor has been summoned as trustee of a legatee, or the legacy has been attached, he is obliged to retain the legacy until the judgment in the case allows him to dispose of it, either by payment to the legatee or the plaintiff in the case as the judgment may be. It has been held that a specific legacy, for example, of shares in stock standing in the name of the testator, may be attached for a debt due by his estate.

Unless a particular mode of paying a legacy is expressly prescribed by the will or by statute, payment may in general be made in any manner which gives to the legatee his due proportion of the estate and which shows an absolute payment. Usually, the payments should be made in money, although with the consent of the parties in interest it may be made in other kinds of personal property. It has been held that a deposit in bank to a legatee's credit without notice thereof does not constitute a good payment. A payment or distribution in kind of stocks, bonds, notes or other securities may be made where the parties interested consent thereto, or where it appears that a conversion of the securities into money should cause a loss. The effect of such a distribution is to discharge the representative from liability for such assets and to give to the legatee who receives the securities the right to maintain or defend suits with respect thereto.

Specific Legacies.

As to specific legacies, the increase of them from the time of the testator's death belongs to the legatee, and not the residuary legatee. Hence where there is a specific bequest of stock, the dividends belong to the legatee from the death of the testator, and the increase of cattle which has been specifically bequeathed likewise belongs to the legatee. General legacies carry interest from the time when they are payable. Although interest on a legacy is not allowed until the end of a year from the testator's death, yet when the income of a fund is given the income begins immediately upon the death of the testator and interest is allowed upon the income, if it is not paid at the end of the year from the testator's death, when it is due. The fact that there are not sufficient assets to allow the legacy to be paid when it is due does not prevent the accumulation of interest thereon until it is paid. When a legacy is given by a parent to a child or for the support of the child and no other provision is made for its maintenance, it is presumed that the testator intends the child to have the benefit of the legacy from the death of the testator, and it has consequently been held that interest begins to run in such a case from the death of the testator, although the legacy may not be payable until the legatee reaches his or her majority.

A payment or distribution properly made and receipted for is binding on the personal representative unless it can be impeached for fraud, mistake or improper means used in procuring it. It is also binding on the legatee or distributee who accepts the payment. After full payment or distribution the personal

representative is released from further liability to the legatees or creditors for acts done in his representative capacity, and he cannot thereafter exercise any control over the property distributed.

After the payment of debts, the duty of the administrator in cases of intestacy is to distribute the estate among those entitled to it by law. The persons to whom and shares in which the estate shall be distributed are regulated by statute in all the states and have considerable similarity in their more important provisions.

A distinction is made in some states between the estate which a woman holds as her separate estate and that which is governed by the rules of the common law. The husband takes the whole of the latter, while of the former he takes the whole only when there are no children. If there is a child or children, the surviving husband divides with them the personal estate of the decedent, share and share alike. In the case of the husband dying, the widow takes one-third of his personal estate, if there is issue; if none, but there are other kindred, she takes one-half; if there is no kindred, she takes all the personalty.

In the event of there being no surviving husband or widow, the personal estate of the decedent goes to the next of kin, which summarizing the law (which is practically the same in every state), the personal estate goes first to the children and grandchildren by right of representation; second, to father and mother or their survivor; third, to collateral heirs as follows: (*a*) brothers and sisters of the whole blood; (*b*) uncles and aunts; (*c*) descendants of brothers and sisters; and, fourth, to next of kin.

The right to a distributive share is a vested interest, vesting in those entitled immediately on the death of the intestate, and, although a settlement of the estate is delayed, and a decree of distribution postponed, yet the decree of distribution when made relates back to the time of the decease of the intestate, and apportions the estate to the persons then entitled or their representatives.

The decree does not create the right, which is determined by the state of things at the intestate's death, but judicially ascertains the distributees, the whole amount to be distributed and the amount of the distributive share of each. The administrator may, however, make a payment of a distributive share without the decree of the probate court, but he does so at his peril. If he pays the right amount to the right person, he will be credited with it in his accounts. And if money has been

advanced by the administrator on account of the distributive shares, and he is compelled to pay interest on funds in his hands up to the time of accounting, he should charge interest on the advance made to the distributees; in the payment of distributive shares, any debt due to the estate from the distributee should be deducted from his share, and the probate court may determine the amount and validity of the debt and make proper order to give effect to the set-off and deduction.

Advancements made to children by the parents in their lifetime are generally considered as being part of the distributive share of the children in the intestate's estate and are to be reckoned as such in computing the proper distribution of the estate. This right to distribution arises in cases of partial as well as total intestacy. To illustrate, if there is a will, but also an estate not covered by the will, or if the will fails as to some portion of the estate which is not covered by any residuary clause, the intestate estate is distributed under the statute of distributions, as if there had been no will. Thus, if the deceased was a married man, and there is partial intestacy, his widow gets her distributive share, and, although she may die before distribution, yet her representative is entitled to her share.

The distribution of the estate among the various next of kin is governed by the law of the state where the deceased last dwelt, although it is different from that of the state where the goods are located, and the rights of next of kin depend upon the laws of the state of domicile. The domicile of a married woman is that of her husband, and the rights of a widow to her distributive share are governed by the laws of her husband's domicile.

Successive Administrators.

An outgoing executor or administrator before the estate is settled should render an account, stating a balance due to or by him to the estate, and should turn over the balance, if due by him to the estate, to the succeeding administrator. In case of the death of the executor or administrator, the same should be done by his executor or administrator. If a balance is due to the estate, and is not turned over to the succeeding administrator, he may sue for it. If an account is not rendered as required the succeeding administrator may compel it.

From the above statement of law it will be observed that there is no privity of estate between successive administrators or their representatives, and a succeeding administrator becomes, by virtue of his appointment, the representative of the estate,

so that he is entitled to call the preceding executor or administrator or his representative to account.

Cases also occur where the estate is indebted to the outgoing executor or administrator, as, for example, where he has advanced money to the estate, as in some cases he may properly do. These advances would naturally be settled by retainer by the outgoing executor or administrator or his representatives of funds enough belonging to the estate to satisfy the debt. However, it may be that the personal estate is insufficient for that purpose and then such advances become a charge upon whatever new assets come into the hands of the succeeding administrator, even upon the proceeds of real estate sold by him to pay debts, and this charge is not barred by the Statute of Limitations. The necessary relief in such a case is for the outgoing administrator or executor to cite the succeeding administrator to file an account upon which citation there would be a hearing at which the representatives of the deceased executor or administrator might ask for an order of court for the payment of his claim. Such a claim should, however, be retained from the assets in his hands while he is still executor or administrator and an accounting made accordingly.

Removal or Resignation.

Having considered the qualifications of executors and administrators, their powers and duties, we will next inquire into the method by which their duties may be terminated and will conclude the subject with a brief review of the law regulating suits by and against them.

As the right to administer upon an intestate estate is regulated by statute, as has been previously seen, it follows that any person who is entitled to administration may, if he has not lost the right by his own act, as waiving or renouncing it, or by negligence in not claiming it when he ought, or not applying when cited, apply for the revocation of letters which have been granted to another wrongfully. This same principle applies where, after an executor is duly appointed, a later will is found and duly proved, appointing another executor, or where, after an administrator has been appointed, as if the estate were intestate, a valid will be found and proved, in which cases the letters wrongfully granted will be revoked. The question arises, whether, when administration is granted as upon an intestate estate, and it afterward appears that a will was left by the deceased, or when administration is granted to one not entitled to it, the grant of administration is made void by the discovery of the will.

Such an appointment is void if in derogation of the rights of the executor, and voidable if in derogation of the rights of the next of kin.

The same personal disqualifications which would prevent the appointment of an executor or administrator to the office will be sufficient reason for his removal, if occurring after his appointment. Insolvency alone, if it does not give ground for apprehending waste or loss to the estate, has been held in New Jersey not to be sufficient cause for revoking administration. But the opposite is the law in some states and is probably the better rule.

Embezzling the estate or wasting it or mismanaging it, or committing a fraud on those entitled to the estate, is cause for removal. Failure to furnish bond, or to file an inventory and appraisement, or to file an account are all causes for the removal of an executor or administrator.

Provision is generally made by statute for the resignation by an executor or administrator of the office to which he has been appointed, and if the circumstances of the case show that he can do so without detriment to the estate, he is allowed to resign. In the absence of statutes, if he petitions to be discharged, the court, viewing him as a trustee, will upon notice to all parties interested, or who might become interested in the estate, allow him to be discharged under the ordinary law of trustees.

Actions by and Against Executors.

An executor or administrator, before appointment, often has in his possession property belonging to the estate, and in such a case he may bring any suit which is for damages done to the possession merely, such as trespass or replevin. He may waive the tort, if the property has been converted, and sue in contract, on an implied agreement on the part of the wrongdoer to pay for the property which he has converted. Such actions would in most cases be a complete defense of the possession of the property, since if the goods belonged to the estate no other person would have any better title than the executor or administrator; but if the goods were claimed by the party against whom the action is brought as his own, the executor or administrator would fail in his action, as he could not prove his title to the property by letters, since these were not yet granted.

As to goods which have never been in his possession, or which others claim by an apparently good title, the principle of the law that an executor gets his title from the will, while an administrator gets his from the grant of letters, results in the

rule that while an administrator cannot begin a suit for such goods till the grant of letters, an executor may begin a suit before probate, and it is sufficient if he is prepared with his letters at the trial of the case. This holds true in cases where he has never had the actual possession of the goods, because his title as executor draws to it the constructive possession of the goods, which will be sufficient to support the action, and may be proved at the trial by the probate of the will. At the present time any suit by an executor which is based upon a title in him as such, except as above stated in regard to goods in his actual possession, must be brought after the probate court has granted his letters to him.

The executor or administrator may have certain rights of action accrued to the estate after the death of the testator or intestate. Thus, if any property belonging to the deceased is, after the death of the owner, taken away or injured by a third person, the executor or administrator may sue for his injury in the proper form of action and may do this either in his individual capacity or as executor or administrator, as the case may be, for the goods are supposed to be in his possession, although he may never have had their actual possession.

Moreover, contracts of the deceased may not be broken by the other party to the contract until after the death of the contractor and, though no cause of action accrues to the estate until such breach, the executor or administrator may sue upon it.

Partners on account of their peculiar relationship cannot sue each other at law for demands based upon partnership dealings during the existence of the partnership. Their only remedy is a bill in equity, in which all the demands and accounts of the partnership are brought together and settled, and the balance of assets or liabilities apportioned between them. This rule, which applies to all cases of settling the affairs of the partnership whenever it is dissolved, applies equally to the case when the partnership is dissolved by the death of one of the partners. The manner in which the personal representative of the estate of the deceased partner obtains the settlement of their accounts is by a bill in equity, in which it is prayed that the partnership affairs be wound up, and that there be an accounting and payment to the plaintiff of whatever may be due to the estate. This accounting involves two sets of accounts: first, accounts of the partnership with strangers, and second, the accounts between the surviving partners and the estate of the deceased partner. All the partnership debts must be paid before anything is due to the estate, and, therefore, in such proceedings a creditor may intervene and obtain the payment of his debt. However, if the debts

of the partnership are all paid, and there is nothing left but a division of the assets, and these assets are real estate, which can be divided up between the surviving partner and the heirs of the deceased partner, a court of equity will not interfere, and order a sale of the land, in order to convert the real assets into money, but will leave the partners to divide up the land. The surviving partners must account for all the profits which have been made in the business since the death of the deceased partner, as well as before and up to the time of closing the account, for his capital is still in the firm and is entitled to its share of the profits.

On the other hand an executor or administrator is bound by all the contracts of the deceased and may be compelled to perform them or to respond for the breach thereof in damages unless the contract is of such a nature as involves the prosecution of the business of the deceased, or is otherwise incompatible with the duties of the executor or administrator in settling the estate. Claims founded on any obligation, contracts, debt, covenant or other duty of the testator or intestate, upon which he migt have been sued in his lifetime, survive his death, and are enforceable against his executor or administrator. Consequently executors or administrators are liable to be sued for debts of every description due from the deceased. Statutes have also been enacted in a majority of the states making action for damages arising out of tort survive the death of the party originally liable, so that his executor or administrator may be sued therefor.

Another liability arises in regard to contracts of the deceased as to conveyances of land. Regarding his contracts to buy land it is held in equity that if the deceased had entered into a binding contract for the purchase of land and died before the payment of the purchase money, he thereby effected a conversion of so much of his estate into realty, and, therefore, the liability to pay purchase money devolves upon the executor or administrator, although the land goes to the heirs. A second liability is that if the deceased had entered into a binding contract for the sale of land, and died before executing the conveyance, the vendee may compel specific performance on the part of the executor or administrator.

WILL

I, , *of the City of* , *State of* , *being of sound mind, memory and understanding, do hereby make, publish and declare this, as and for my last Will and Testament, hereby revoking and making void any and all previous Wills, by me at any time heretofore made.*

FIRST: *I direct that all my just debts and funeral expenses shall be paid as soon as conveniently may be after my decease.*

SECOND: *I hereby give, devise and bequeath unto , the sum of Dollars ($ as and for his own property absolutely.*

THIRD: *All the rest, residue and remainder of my estate, real, personal and mixed, of whatsoever kind and wheresoever situate, I give, devise and bequeath unto , and his heirs absolutely.*

FOURTH: *I hereby confer upon my Executor power at any time to sell any real estate which may at any time form part of my estate for such prices, upon such terms, in such way and manner, and for such interests and estates, as he may deem wise, and make good deeds therefor to the purchasers thereof, without any obligation on the latter to see to or be responsible for the application of the purchase money. And I further authorize my Executor to sell any and all real estate, which may be situated in any foreign State, without the giving of any Bond therefor, notwithstanding any local statutes to the contrary.*

FIFTH: *I nominate, constitute and appoint , to be the Executor of this my last Will and Testament.*

IN WITNESS WHEREOF, *I have hereunto set my hand and seal this day of A. D. 193 .*

..... [SEAL]

SIGNED, SEALED, PUBLISHED *and* DECLARED *by the above named , as and for his last Will and Testament, in the presence of us who were present at the same time, and who at his request and in his presence and in the presence of each other, have hereto subscribed our names as witnesses.*

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CONSTITUTIONAL LAW

Articles of Confederation—Federal Constitution Analyzed—Powers of Congress, Executive, Judiciary—Anti-Trust Laws—Tariffs —Income Tax—Amendments.

THE erudite Story defines a constitution to be a "fundamental law or basis of government." More broadly speaking, a constitution is that law of a state or a combination of states which contains the principles upon which government is founded, regulates the division of sovereign powers and directs to what person or body each of these powers is to be entrusted and the manner of its exercise. A constitution is to the departments of the government what a law is to individuals, and it is not only a rule of action to the branches of government, but it is that from which their existence flows and by which the powers which may have been committed to them are prescribed.

The most famous of all written constitutions is that of the United States, and derives its whole authority from the fact that it was ratified by conventions in the several states whose members were elected by the people. When thus adopted it became a complete obligation, and, therefore, bound the states and the citizens thereof. As our Constitution is an agreement of the people in their individual capacities, reduced to writing, establishing and fixing certain principles for the government of themselves, it is invaluable to every citizen to have a thorough knowledge of the history of its formation, its general contents and the interpretation placed thereon by the courts established by it.

Articles of Confederation.

In 1775 a Congress composed of representatives of the American colonies appointed a committee to prepare a Declaration of Independence and a committee to prepare a plan of confederation for the colonies. Dr. Benjamin Franklin, as early as August 21, 1775, submitted to that body a sketch entitled "Articles of Confederation and Perpetual Union of the Colonies," which became a basis for the articles reported on July 12, 1776. These articles of confederation were amended from time to time until November 17, 1777, when Congress determined to propose them to the states. The last state to ratify them was Maryland, on March 1, 1781. In the language of Chancellor Kent, "the exclusive cognizance of our foreign relations, the rights of war

and peace, the requisitions of men and money, were confided to Congress, and the exercise of them was binding upon the states." But in imitation of all former confederacies of independent states, either in ancient Greece or modern Europe, the articles of confederation carried the decrees of the Federal Council to the states in their sovereign or collective capacity. This was the great fundamental defect in the confederation of 1781; it led to its eventual overthrow, and it has proved pernicious or destructive to all other federal governments which adopted the principle.

Disobedience to the laws of the Union must either be submitted to by the government, to its own disgrace, or those laws must be enforced by arms. The mild influence of the civil magistrate, however strongly it may be felt and obeyed by private individuals, will not be heeded by an organized community, conscious of its power and swayed by its passions. The history of the federal government of Greece, Germany, Switzerland and Holland afford melancholy examples of destructive civil war springing from the disobedience of the separate members. The weakness of the confederation and the need of the substitution of a more stable system was pointed out by Alexander Hamilton in a letter to James Duane, September 3, 1780.

The Constitution.

In May, 1785, Congress failed to act on the report of a committee recommending an alteration of the first paragraph of the ninth of the Articles of Confederation, so as to enlarge the powers of Congress, especially as to trade; and the Legislature of Virginia, on January 21, 1786, appointed commissioners to meet such commissioners as might be appointed by other states to examine the relative situation and trade of such states, to consider how far a uniform system in their commercial regulation may be necessary to their common interest and their permanent harmony; and to report to the several states such an act relative to this great object as, when unanimously ratified by them, will enable the United States in Congress effectually to provide for the same. The commissioners of only four states besides Virginia, to wit, Delaware, Pennsylvania, New Jersey and New York, met in Annapolis on the first Monday in September, 1786. A report drawn by Alexander Hamilton was agreed upon, recommending that commissioners from all the states meet on the second Monday of the following May.

As a result a convention of delegates from all the original thirteen states, except Rhode Island, met at Philadelphia, May

14, 1787. On September 17 a form of constitution was unanimously agreed upon, and on September 28 submitted to the Congress of the Confederation. Conformable to recommendations as to its adoption, it was sent by the Congress to the state legislatures in order to be ratified or rejected by conventions of delegates chosen in each state by the people. The several state conventions ratified the Constitution as follows: Delaware, December 7, 1787; Pennsylvania, December 12, 1787; New Jersey, December 18, 1787; Georgia, January 22, 1788; Connecticut, January 9, 1788; Massachusetts, February 6, 1788; Maryland, April 28, 1788; South Carolina, May 23, 1788; New Hampshire, June 21, 1788; Virginia, June 26, 1788; New York, July 26, 1788; North Carolina, November 21, 1788; Rhode Island, May 27, 1790. Article VII of the Constitution provides that "the ratification of the convention of nine states shall be sufficient for the establishment of this Constitution between the states so ratifying the same." The ratification by the ninth state was read to Congress on July 2, 1788, and on September 13 Congress passed the following: "Resolved, That the first Wednesday in January next be the day for appointing electors in the several states which before the said day shall have ratified the said Constitution; that the first Wednesday in February next be the day for the electors to assemble in their respective states and vote for a President, and the first Wednesday in March next be the time and the present seat of Congress (New York) the place for commencing proceedings under the said Constitution." Proceedings having taken place conformably to this resolution, Washington took the oath of office on April 30, and Congress met on March 4. Owing to the want of a quorum the House did not organize until April 1, nor the Senate until April 6. The supreme court has held that the operation of the Constitution "did not commence before the first Wednesday in March, 1789." In view of the compact between the states, it is not possible for a single state, without violating this agreement, to withdraw from the Union or to deprive itself of its rights as one of the United States.

Having briefly outlined the history leading up to the adoption of the Constitution, before taking up its specific provisions, let us inquire first into its general effect and application.

When the Constitution was ratified the thirteen original states were existing governments, and those states which have been admitted into the Union since 1789 have, as regards the United States and the other states, the same rights, powers and obligations as the thirteen original states. The result is, and it

is extremely important to bear in mind, that in so far as the states are not controlled by the express or implied restrictions contained in the Constitution of the United States they may severally exercise all the powers of independent government. The authority of the Constitution is, of course, sovereign, but so far as their freedom of action is not controlled by that instrument, the states united thereunder are independent of one another.

In its relation to the several states and the citizens thereof, the United States Government is one of delegated and limited powers. The Constitution emphatically states in the language of its well-known preamble that it is established by the people, not the states, which rendered the states dependent and subordinate for all specific purposes for which it was adopted.

Three Governmental Branches.

There is created by the Constitution a government divided into three departments, legislative, executive and judicial. The duty being vested in the executive department to administer the laws of Congress, and the primary duty of the judicial department being to expound the Constitution and the laws in their application to subject-matters of judicial cognizance, either civil or criminal, it is manifest that the powers conferred upon the Government of the United States by the Constitution are principally powers of legislation. These powers are either expressed or implied, the former being such as are specifically stated, whereas the latter are those which authorize the use of appropriate means which are consistent with the letter and spirit of the Constitution for the accomplishment of legitimate ends which are not prohibited and which are within the scope of the Constitution. Certain express exceptions are made to the powers granted by the Constitution to the United States, contained in the ninth section of Article I and in the first eleven of the amendments.

Section 2 of Article VI provides that "This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." By virtue of this article, the Government of the United States is, in the language of that immortal expounder of the Constitution, Chief Justice Marshall, "though limited in its powers, supreme within its sphere of action, and to the extent and in the exercise of the powers delegated to it, it is a sovereignty."

The Constitution imposes certain restraints upon the several states, the same being either expressed or implied. The express restraints are, of course, those specifically set forth in the Constitution. Implied restraints are those which result from the express grant by the Constitution of certain powers whose nature or the terms of whose grant require that they should be exclusively exercised by the United States. Included among the express restraints are those which affect the relations of the several states to other states, foreign and domestic; and, second, those which have reference to the relations between the states and their citizens, and which limit the exercise by these states of their power of legislation. The prohibition against making treaties, alliances, confederations, agreements or compacts with another state, or with a foreign power is an illustration of an express restraint of the first class. Forbidding a state to grant titles of nobility, to coin money, to impose duties of tonnage and duties on imports or exports; the prohibition against depriving any person of life, liberty or property without due process of law, illustrate express restraints of the second class.

The implied restraints limit the action of the states with regard to taxation, the regulation of commerce and the personal and property rights of their citizens, and of the citizens of other states.

The territory owned at the time the Constitution was adopted and that acquired subsequently thereto are subject to its terms and provisions the same as any state, by virtue of the clause providing that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States." In consequence of this authority the supreme court decided in the famous Insular Cases that Congress could, after the acquisition of Porto Rico as territory of the United States, impose duties upon importations into ports of the United States from Porto Rico, and into ports of Porto Rico from the United States and foreign countries.

Federal Constitution Analyzed.

Having indicated the general nature and application of the Constitution of the United States, together with the leading principles adopted for its construction, we are now in a better position to discuss its separate provisions more intelligently.

There are three departments of government provided for by the Constitution, to wit, Legislative, Executive and Judicial.

Article I vests the legislative power in a Congress consist-

ing of a Senate and House of Representatives. The system of apportionment of representatives in Congress, their qualifications, the method of organizing both branches, together with their general powers, set forth in the first seven sections of Article I, are well known and require no special comment. All bills for raising revenue must originate in the House of Representatives, but the Senate may or may not concur with amendments as on other bills. Every bill passing the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States, who must sign same if meeting his approval; if not, it must be returned to that House in which it originated, where the objections are entered on the journal, and a reconsideration taken. If upon reconsideration two-thirds of that House shall agree to pass the bill it must be sent, together with the objections, to the other House, by which it must likewise be reconsidered and approved by two-thirds of that House, when it shall become a law. If a President fails to return a bill within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law the same as if he signed it, "unless Congress by their adjournment prevent its return, in which case it shall not become a law." Not only every bill, but every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment), must be presented to the President of the United States, and before the same becomes effective it must be approved by him, or, being disapproved, must be re-passed by two-thirds of the Senate and House the same as in the case of a bill.

Powers of Congress.

The eighth section of Article I, particularly enumerating the powers of Congress, is one of such transcendent importance as to warrant a very careful inquiry. Under this section Congress is empowered:

1. To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States. But all duties, imposts and excises shall be uniform throughout the United States.
2. To borrow money on the credit of the United States.
3. To regulate commerce with foreign nations and among the several states, and with the Indian tribes.
4. To establish a uniform rule of naturalization and uniform laws on the subject of bankruptcy, throughout the United States.

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.

6. To provide for the punishment of counterfeiting the securities and current coin of the United States.

7. To establish post-offices and post-roads.

8. To promote the progress of science and useful arts by securing for limited terms to authors and inventors the exclusive right to their respective writings and discoveries.

9. To constitute tribunals inferior to the supreme court; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.

10. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

11. To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years.

12. To provide and maintain a navy.

13. To make rules for the government and regulation of the land and naval forces.

14. To provide for calling forth the militia to execute the laws of the nation, suppress insurrections and repel invasions.

15. To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of officers and the authority of training the militia according to the discipline described by Congress.

16. To exercise exclusive legislation in all cases whatsoever, over such district not exceeding ten miles square, as may, by cession of particular states, and the acceptance of Congress, become the seat of government of the United States; and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be for the erection of forts, magazines, arsenals, dockyards and other needful buildings.

17. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

The Taxing Power.

The most necessary power granted to Congress is the first mentioned—*i. e.*, "to lay and collect taxes," etc. Taxation is the compulsory exaction by a government, in the exercise of its sovereignty, of a payment or surrender of property by any

person, natural or corporate, who or whose property so taxed is subject to the sovereign power of that government. The power to levy and collect taxes, duties, imposts and excises is co-extensive with the territory of the United States. A public use or purpose is essential to the idea of tax, and a tax for a private purpose is unconstitutional, and Congress is not empowered to tax for those purposes which are within the exclusive province of the state. Every possible exaction of money or property by a government from those who are subject to its jurisdiction is not a tax; thus a duty of so much per passenger imposed by the United States in the exercise of the power to regulate commerce, on owners of vessels bringing passengers from foreign ports into ports of the United States, in order to raise a fund to mitigate the evils incident to immigration, is "not a tax or duty within the meaning of the Constitution." There is one exception and two qualifications to the power of Congress to levy and collect taxes. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, the taxing power reaches every subject and may be exercised at discretion.

The requirement of uniformity means that there must be geographical uniformity, or, in other words, that "wherever a subject is taxed anywhere, the same must be taxed everywhere, throughout the United States and at the same rate," and taxation is uniform when it operates with the same effect in all places where the subject of taxation is found, though that subject be not equally distributed throughout the United States.

It is well settled that the United States cannot tax the agencies of a state, for example, the salary of a judicial officer of a state, nor the revenue of a municipal corporation derived from its loan of capital to a railway.

Every individual state may, so far as it is not restrained by the Constitution, tax all persons, natural or corporate, and all property, real or personal, within its territory and subject to its sovereignty, and may regulate the manner of levying and collecting its taxes. It has been held that under the general rule which permits a government to tax all persons and property within its jurisdiction, the states may impose a duty on the devolution of title to real estate from their citizens to alien nonresidents; they may tax descents and inheritances and they may classify and vary the rate of taxation with reference to lineal and collateral relationship; a state may tax mortgages of lands within their limits. A state cannot tax the operations of banks incorporated by the Government of the United States as fiscal

agencies. In the case of national banks, state taxation is by the forty-first section of the act of June 3, 1864, permitted as to the shares in any bank when "included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the state."

Congress has not an unlimited power of taxation, but it is limited to specific objects—the payment of the public debts and providing for the common defense and general welfare. A tax, therefore, laid by Congress for neither of these objects would be unconstitutional as an excess of its legislative authority.

Having ascertained that the power of taxation, though general as to the subjects to which it may be applied is yet restrictive as to the purposes for which it may be exercised, it next becomes matter of inquiry, what were the reasons for which this power was given and what were the objections to which it was deemed liable? It was admitted by all that the power of taxation should be vested in the National Government. Without such a power it would not be possible to provide for the support of the national forces by land or sea or the national civil list or the ordinary charges and expenses of the government. For these purposes, at least, there must be a constant and regular supply of revenue. If there should be a deficiency one of two evils must inevitably ensue, either the people must be subjected to continual arbitrary plunder or the government must sink into a fatal atrophy. The former is the fate of Turkey under its sovereigns, the latter threatened to be the fate of America under the confederation. The power of taxation must be co-extensive with the powers, wants and duties of the National Government.

The only inquiry properly remaining is whether the resources of taxation should be specified and limited or whether the power in this respect should be general, leaving a full choice to the national legislature. Every government ought to contain within itself every power requisite to the full accomplishment of the objects committed to its care, and the complete execution of the trusts for which it is responsible, free from every other control, but a regard to the public good and to the security of the people. In other words, every power ought to be proportionate to its objects. As stated by Chief Justice Story in his Commentaries: "Revenue is the essential engine by which the means of answering the national exigencies must be procured; and, therefore, the power of procuring it must necessarily be comprehended in that of providing for those exigencies." Theory as well as practice conspire to prove that the power of procuring revenue is unavailing and a mere mockery when exercised over

states in their collective capacities. If, therefore, the Federal Government was to be of any efficiency and a bond of union it ought to be invested with an unqualified power of taxation for national purposes.

Taxes are either direct or indirect, and it is important to clearly understand the difference. The Constitution, by giving the power to lay and collect taxes in general terms, doubtless meant to include all sorts of taxes, whether direct or indirect. Under the former denomination are included taxes on land or real property, and under the latter taxes on articles of consumption.

The fourth clause of the ninth section of the first article declares that "no capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken." Ordinarily all taxes paid primarily by persons who can shift the burden upon someone else, or who are under no legal compulsion to pay them, are considered indirect taxes, and taxes imposed upon individuals in their personal capacity or upon individuals in respect of their ownership of their property are direct taxes. The supreme court in one of its earliest decisions ruled that a tax on carriages for the conveyance of persons was an excise and therefore an indirect tax. In the argument Alexander Hamilton said: "The following are presumed to be the only direct taxes: Capitation, or poll taxes; taxes on land and buildings; general assessments, whether on the whole property of individuals or on their whole real or personal property. All else must of necessity be considered indirect taxes."

Income Tax.

Certain statesmen have from time to time advocated the imposition of an income tax. But it is the consensus of economic authorities that the income tax laws, even when wisely framed, should be reserved only for great public emergencies, for the reason that they are necessarily unequal in operation in that they fall most heavily on those who conscientiously make full returns; and that when resorted to they should tax impartially the surplus income of every citizen over and above that minimum which suffices for the necessities of the life of an individual, and that incomes received from salaries or from professional compensation, if taxed at all, should, by reason of their terminable character be less heavily taxed than incomes derived from invested funds. Under the income tax legislation of 1861 and its supplements, when the amount exempted was $600, the tax was paid by only 460,000 persons, and when the amount exempted was $1,000, the tax was paid by less than 250,000 persons. The

population and wealth of the country had largely increased in the years preceding 1894, but it is certain by reason of the larger amount exempted from taxation under the act of that year, the burden of the tax imposed by that law would have been borne by a relatively small number of persons, certainly not more than two per cent of the population of the country.

The income tax law of 1894 was a very objectionable specimen of class legislation. Not content with exempting the minimum amount which suffices for the necessities of the life of an individual, and which in 1894 certainly did not exceed $600, it enlarged the exemption to $4,000. It made no distinction between income received from salaries or as professional compensation and income derived from invested securities. The constitutionality of that act came before the Supreme Court of the United States in 1895. It was at first decided that so much of the act as provided for levying taxes upon incomes derived from real estate was invalid, because such taxes are in legal effect taxes upon real estate and are as such direct taxes which can only be imposed according to the rule of apportionment, and that so much of that act as taxed income derived from investments in state, county and municipal securities was invalid, because they were taxes on the states and on their instrumentalities of government. Upon a rehearing of the argument on this question the supreme court decided, in addition to the points decided at the first hearing, that a tax on an individual in respect of his income derived from real or personal property is a direct tax, and therefore can be laid only under the rule of apportionment.

The Income Tax Law is subject to almost constant changes, and the reader is therefore cautioned to regard the law and regulations set forth herein as being only temporary. The Income Tax Law with the regulations adopted by the Internal Revenue Department are so complex as to render it inexpedient to endeavor to embrace all of the intricacies of this Law. We shall, therefore, limit our survey to the more general provisions of the act and to the more important interpretations thereof.

PART I

RATES OF TAX.

NORMAL TAX ON INDIVIDUALS.

SEC. 11. There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax equal to the sum of the following:

(*a*) 1½ per centum of the first $4,000 of the amount of the net income in excess of the credits against net income provided in section 25;

(*b*) 3 per centum of the next $4,000 of such excess amount; and

(*c*) 5 per centum of the remainder of such excess amount.

SURTAX ON INDIVIDUALS.

SEC. 12. (*a*) **Rates of Surtax.**—There shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax as follows:

Upon a net income of $10,000 there shall be no surtax; upon net incomes in excess of $10,000 and not in excess of $14,000, 1 per centum of such excess.

$40 upon net incomes of $14,000; and upon net incomes in excess of $14,000 and not in excess of $16,000, 2 per centum in addition of such excess.

$80 upon net incomes of $16,000; and upon net incomes in excess of $16,000 and not in excess of $18,000, 3 per centum in addition of such excess.

$140 upon net incomes of $18,000; and upon net incomes in excess of $18,000 and not in excess of $20,000, 4 per centum in addition of such excess.

$220 upon net incomes of $20,000; and upon net incomes in excess of $20,000 and not in excess of $22,000, 5 per centum in addition of such excess.

$320 upon net incomes of $22,000; and upon net incomes in excess of $22,000 and not in excess of $24,000, 6 per centum in addition of such excess.

$440 upon net incomes of $24,000; and upon net incomes in excess of $24,000 and not in excess of $28,000, 7 per centum in addition of such excess.

$720 upon net incomes in $28,000; and upon net incomes in excess of $28,000 and not in excess of $32,000, 8 per centum in addition of such excess.

$1,040 upon net incomes of $32,000; and upon net incomes in excess of $32,000 and not in excess of $36,000, 9 per centum in addition of such excess.

$1,400 upon net incomes of $36,000; and upon net incomes in excess of $36,000 and not in excess of $40,000, 10 per centum in addition of such excess.

$1,800 upon net incomes of $40,000; and upon net incomes in excess of $40,000 and not in excess of $44,000, 11 per centum in addition of such excess.

$2,240 upon net incomes of $44,000; and upon net incomes in excess of $44,000 and not in excess of $48,000, 12 per centum in addition of such excess.

$2,720 upon net incomes of $48,000; and upon net incomes in excess of $48,000 and not in excess of $52,000, 13 per centum in addition of such excess.

$3,240 upon net incomes of $52,000; and upon net incomes in excess of $52,000 and not in excess of $56,000, 14 per centum in addition of such excess.

$3,800 upon net incomes of $56,000; and upon net incomes in excess of $56,000 and not in excess of $60,000, 15 per centum in addition of such excess.

$4,400 upon net incomes of $60,000; and upon net incomes in excess of $60,000 and not in excess of $64,000, 16 per centum in addition of such excess.

$5,040 upon net incomes of $64,000; and upon net incomes in excess of $64,000 and not in excess of $70,000, 17 per centum in addition of such excess.

$6,060 upon net incomes of $70,000; and upon net incomes in excess of $70,000 and not in excess of $80,000, 18 per centum in addition of such excess.

$7,860 upon net incomes of $80,000; and upon net incomes in excess of $80,000 and not in excess of $100,000, 19 per centum in addition of such excess.

$11,660 upon net incomes of $100,000; and upon net incomes in excess of $100,000, in addition 20 per centum of such excess.

(*b*) **Sale of Mines and Oil or Gas Wells.**—For limitation of surtax attributable to sale of mines and oil or gas wells, see section 102.

(*c*) **Capital Net Gains and Losses.**—For rate and computation of tax in lieu of normal and surtax in case of net incomes of not less than $30,000, approximately, or in case of net incomes, excluding items of capital gain, capital loss, and capital deductions, of not less than $30,000, approximately, see section 101.

(*d*) **Evasion of Surtaxes by Incorporation.**—For tax on corporations which accumulate surplus to evade surtax on stockholders, see section 104.

TAX ON CORPORATIONS.

SEC. 13. (*a*) **Rate of Tax.**—There shall be levied, collected, and paid for each taxable year upon the net income of every corporation, a tax of 12 per centum of the amount of the net income in excess of the credits against net income provided in section 26.

(*b*) **Exempt Corporations.**—For corporations exempt from tax, see section 103.

(*c*) **Improper Accumulation of Surplus.**—For tax on corporations which accumulate surplus to evade surtax on stockholders, see section 104.

TAXABLE PERIOD EMBRACING YEARS WITH DIFFERENT LAWS

SEC. 14. If a taxable period embraces portions of two calendar years for which the laws are different, the tax shall be computed as provided in section 105.

PART II

COMPUTATION OF NET INCOME.

NET INCOME.

SEC. 21. "Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

GROSS INCOME.

SEC. 22. (*a*) **General Definition.**—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

(*b*) **Exclusions from Gross Income.**—The following items shall not be included in gross income and shall be exempt from taxation under this title:

(1) LIFE INSURANCE.—Amounts received under a life insurance contract paid by reason of the death of the insured, whether in a single sum or in installments (but if such amounts are held by the insurer under an agreement to pay interest thereon, the interest payments shall be included in gross income);

(2) ANNUITIES, ETC.—Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts) under a life insurance, endowment, or annuity contract, but if such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premiums or consideration paid (whether or not paid during the taxable year) then the excess shall be included in gross income. In the case of a transfer for a valuable consideration, by assignment or otherwise, of a life insurance, endowment, or annuity contract, or any interest therein, only the actual value of such consideration and the amount of the premiums and other sums subsequently paid by the transferee shall be exempt from taxation under paragraph (1) or this paragraph;

(3) GIFTS, BEQUESTS, AND DEVISES.—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);

(4) TAX-FREE INTEREST.—Interest upon (A) the obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia; or (B) securities issued under the provisions of the Federal Farm Loan Act, or under the provisions of such Act as amended; or (C) the obligations of the United States or its possessions. Every person owning any of the obligations or securities enumerated in clause (A), (B), or (C) shall, in the return required by this title, submit a statement showing the number and amount of such obligations and securities owned by him and the income received therefrom, in such form and with such information as the Commissioner may require. In the case of obligations of the United States issued after Septem-

ber 1, 1917 (other than postal savings certificates of deposit), the interest shall be exempt only if and to the extent provided in the respective Acts authorizing the issue thereof as amended and supplemented, and shall be excluded from gross income only if and to the extent it is wholly exempt to the taxpayer from income taxes;

(5) Compensation for Injuries or Sickness.—Amounts received, through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness;

(6) Pensions and World War Compensation Payments.—Amounts received as compensation, family allotments and allowances under the provisions of the War Risk Insurance and the Vocational Rehabilitation Acts or the World War Veterans' Act, 1924, or as pensions from the United States for service of the beneficiary or another in the military or naval forces of the United States in time of war, or as a State pension for services rendered by the beneficiary or another for which the State is paying a pension;

(7) Building and Loan Associations.—The amount received by an individual as dividends or interest from domestic building and loan associations, substantially all the business of which is confined to making loans to members, but the amount excluded from gross income under this paragraph in any taxable year shall not exceed $300;

(8) Ministers.—The rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation;

(9) Miscellaneous Items.—The following items, to the extent provided in section 116:

Earned income from sources without the United States;
Salaries of certain Territorial employees;
The income of foreign governments;
Income of States, municipalities and other political subdivisions;
Receipts of shipowners' mutual protection and indemnity associations;
Dividends from China Trade Act corporations.

(c) **Inventories.**—Whenever in the opinion of the Commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner, with the approval of the Secretary, may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income.

(d) **Distributions by Corporations.**—Distributions by corporations shall be taxable to the shareholders as provided in section 115.

(e) **Determination of Gain or Loss.**—In the case of a sale or other disposition of property, the gain or loss shall be computed as provided in sections 111, 112, and 113.

(f) **Gross Income from Sources Within and Without United States.**—For computation of gross income from sources within and without the United States, see section 119.

DEDUCTIONS FROM GROSS INCOME.

Sec. 23. In computing net income there shall be allowed as deductions:

(a) **Expenses.**—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

(b) **Interest.**—All interest paid or accrued within the taxable year on indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued

after September 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from taxation under this title.

(*c*) **Taxes Generally.**—Taxes paid or accrued within the taxable year, except—

(1) income, war-profits, and excess-profits taxes imposed by the authority of the United States;

(2) so much of the income, war-profits, and excess-profits taxes imposed by the authority of any foreign country or possession of the United States as is allowed as a credit against the tax under section 131; and

(3) taxes assessed against local benefits of a kind tending to increase the value of the property assessed; but this paragraph shall not exclude the allowance as a deduction of so much of such taxes as is properly allocable to maintenance or interest charges.

For the purpose of this subsection, estate, inheritance, legacy, and succession taxes accrue on the due date thereof, except as otherwise provided by the law of the jurisdiction imposing such taxes, and shall be allowed as a deduction only to the estate.

(*d*) **Taxes of Shareholder Paid by Corporation.**—The deduction for taxes allowed by subsection (*c*) shall be allowed to a corporation in the case of taxes imposed upon a shareholder of the corporation upon his interest as shareholder which are paid by the corporation without reimbursement from the shareholder, but in such cases no deduction shall be allowed the shareholder for the amount of such taxes.

(*e*) **Losses by Individuals.**—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft.

(*f*) **Losses by Corporations.**—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

(*g*) **Basis for Determining Loss.**—The basis for determining the amount of deduction for losses sustained, to be allowed under subsection (*e*) or (*f*), shall be the same as is provided in section 113 for determining the gain or loss from the sale or other disposition of property.

(*h*) **Loss on Sale of Stock or Securities.**—For disallowance of loss deduction in the case of sales of stock or securities where within thirty days before or after the date of the sale the taxpayer has acquired substantially identical property, see section 118.

(*i*) **Net Losses.**—The special deduction for net losses of prior years, to the extent provided in section 117.

(*j*) **Bad Debts.**—Debts ascertained to be worthless and charged off within the taxable year (or, in the discretion of the Commissioner, a reasonable addition to a reserve for bad debts); and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt to be charged off in part.

(*k*) **Depreciation.**—A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

(*l*) **Depletion.**—In the case of mines, oil, and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to

be prescribed by the Commissioner, with the approval of the Secretary, In the case of leases the deduction shall be equitably apportioned between the lessor and lessee. In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each. (For percentage depletion in case of oil and gas wells, see section 114(*b*)(3).)

(*m*) **Basis for Depreciation and Depletion.**—The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114.

(*n*) **Charitable and Other Contributions.**—In the case of an individual, contributions or gifts made within the taxable year to or for the use of:

(1) the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, for exclusively public purposes;

(2) any corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(3) the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act;

(4) posts or organizations of war veterans. or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private shareholder or individual; or

(5) a fraternal society, order, or association, operating under the lodge system, but only if such contributions or gifts are to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals;

to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary. (For unlimited deduction if contributions and gifts exceed 90 per centum of the net income, see section 120.)

(*o*) **Future Expenses in Case of Casual Sales of Real Property.**—In the case of a casual sale or other casual disposition of real property by an individual, a reasonable allowance for future expense liabilities, incurred under the provisions of the contract under which such sale or other disposition was made, under such regulations as the Commissioner, with the approval of the Secretary, may prescribe, including the giving of a bond, with such sureties and in such sum (not less than the estimated tax liability computed without the benefit of this subsection) as the Commissioner may require, conditioned upon the payment (notwithstanding any statute of limitations) of the tax, computed without the benefit of this subsection, in respect of any amounts allowed as a deduction under this subsection and not actually expended in carrying out the provisions of such contract.

(*p*) **Dividends Received by Corporations.**—In the case of a corporation, the amount received as dividends—

(1) from a domestic corporation, or

(2) from any foreign corporation when it is shown to the satisfaction of the Commissioner that more than 50 per centum of the gross income of such foreign corporation for the three-year period ending with the close of its taxable year preceding the declaration of such dividends (or for such part of

such period as the foreign corporation has been in existence) was derived from sources within the United States as determined under section 119.

The deduction allowed by this subsection shall not be allowed in respect of dividends received from a corporation organized under the China Trade Act, 1922, or from a corporation which under section 251 is taxable only on its gross income from sources within the United States by reason of its receiving a large percentage of its gross income from sources within a possession of the United States.

(*q*) **Pension Trusts.**—An employer establishing or maintaining a pension trust to provide for the payment of reasonable pensions to his employees (if such trust is exempt from tax under section 165, relating to trusts created for the exclusive benefit of employees) shall be allowed as a deduction (in addition to the contributions to such trust during the taxable year to cover the pension liability accruing during the year, allowed as a deduction under subsection (*a*) of this section) a reasonable amount transferred or paid into such trust during the taxable year in excess of such contributions, but only if such amount (1) has not theretofore been allowable as a deduction, and (2) is apportioned in equal parts over a period of ten consecutive years beginning with the year in which the transfer or payment is made.

ITEMS NOT DEDUCTIBLE.

SEC. 24. (*a*) **General Rule.**—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses;

(2) Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate;

(3) Any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made; or

(4) Premiums paid on any life insurance policy covering the life of any officer or employee, or of any person financially interested in any trade or business carried on by the taxpayer, when the taxpayer is directly or indirectly a beneficiary under such policy.

(*b*) **Holders of Life or Terminable Interest.**—Amounts paid under the laws of any State, Territory, District of Columbia, possession of the United States, or foreign country as income to the holder of a life or terminable interest acquired by gift, bequest, or inheritance shall not be reduced or diminished by any deduction for shrinkage (by whatever name called) in the value of such interest due to the lapse of time, nor by any deduction allowed by this Act (except the deductions provided for in subsections (*k*) and (*l*) of section 23) for the purpose of computing the net income of an estate or trust but not allowed under the laws of such State, Territory, District of Columbia, possession of the United States, or foreign country for the purpose of computing the income to which such holder is entitled.

(*c*) **Tax Withheld on Tax-free Covenant Bonds.**—For tax withheld on tax-free covenant bonds, see section 144(*a*)(4).

CREDITS OF INDIVIDUAL AGAINST NET INCOME.

SEC. 25. There shall be allowed for the purpose of the normal tax, but not for the surtax, the following credits against the net income:

(*a*) **Dividends.**—The amount received as dividends—

(1) from a domestic corporation, or

(2) from a foreign corporation when it is shown to the satisfaction of the Commissioner that more than 50 per centum of the gross income of such foreign corporation for the three-year period ending with the close of its taxable year preceding the declaration of such dividends (or for such part of such period as the corporation has been in existence) was derived from sources within the United States as determined under the provisions of section 119. The credit allowed by this subsection shall not be allowed in respect of dividends received from a corporation organized under the China Trade Act, 1922, or from a corporation which under section 251 is taxable only on its

gross income from sources within the United States by reason of its receiving a large percentage of its gross income from sources within a possession of the United States.

(*b*) **Interest on United States Obligations.**—The amount received as interest upon obligations of the United States which is included in gross income under section 22.

(*c*) **Personal Exemption.**—In the case of a single person, a personal exemption of $1,500; or in the case of the head of a family or a married person living with husband or wife, a personal exemption of $3,500. A husband and wife living together shall receive but one personal exemption. The amount of such personal exemption shall be $3,500. If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them.

(*d*) **Credit for Dependents.**—$400 for each person (other than husband or wife) dependent upon and receiving his chief support from the taxpayer if such dependent person is under eighteen years of age or is incapable of self-support because mentally or physically defective.

(*e*) **Change of Status.**

(1) The credit for dependents shall be determined by the status of the taxpayer on the last day of his taxable year.

(2) The personal exemption allowed by subsection (*c*) of this section shall, in case the status of the taxpayer changes during his taxable year, be the sum of an amount which bears the same ratio to $1,500 as the number of months during which the taxpayer was single bears to twelve months, plus an amount which bears the same ratio to $3,500 as the number of months during which the taxpayer was a married person living with husband or wife or was the head of a family bears to twelve months. For the purposes of this paragraph a fractional part of a month shall be disregarded unless it amounts to more than half a month, in which case it shall be considered as a month.

(3) In the case of an individual who dies during the taxable year, the personal exemption and the credit for dependents shall be determined by his status at the time of his death, and in such case full credits shall be allowed to the surviving spouse, if any, according to his or her status at the close of the taxable year.

CREDITS OF CORPORATION AGAINST NET INCOME.

SEC. 26. For the purpose only of the tax imposed by section 13 there shall be allowed the following credits:

(*a*) The amount received as interest upon obligations of the United States which is included in gross income under section 22; and

(*b*) In the case of a domestic corporation the net income of which is $25,000 or less, a specific credit of $3,000; but if the net income is more than $25,000 the tax imposed by section 13 shall not exceed the tax which would be payable if the $3,000 credit were allowed, plus the amount of the net income in excess of $25,000.

PART III

CREDITS AGAINST TAX.

EARNED INCOME CREDIT.

SEC. 31. (*a*) **Definitions.**—for the purposes of this section—

(1) "Earned income" means wages, salaries, professional fees, and other amounts received as compensation for personal services actually rendered, but does not include that part of the compensation derived by the taxpayer for personal services rendered by him to a corporation which represents a distribution of earnings or profits rather than a reasonable allowance as compensation for the personal services actually rendered. In the case of a taxpayer engaged in a trade or business in which both personal services and

capital are material income producing factors, a reasonable allowance as compensation for the personal services actually rendered by the taxpayer, not in excess of 20 per centum of his share of the net profits of such trade or business, shall be considered as earned income,

(2) "Earned income deductions" means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable, to or chargeable against earned income.

(3) "Earned net income" means the excess of the amount of the earned income over the sum of the earned income deductions. If the taxpayer's net income is not more than $5,000, his entire net income shall be considered to be earned net income, and if his net income is more than $5,000, his earned net income shall not be considered to be less than $5,000, In no case shall the earned net income be considered to be more than $30,000.

(*b*) **Allowance of Credit.**—In the case of an individual the tax shall be credited with 25 per centum of the amount of tax which would be payable if his earned net income constituted his entire net income; but in no case shall the credit allowed under this subsection exceed 25 per centum of his normal tax plus 25 per centum of the surtax which would be payable if his earned net income constituted his entire net income. This credit shall be in addition to all other credits against the tax.

TAXES OF FOREIGN COUNTRIES AND POSSESSIONS OF UNITED STATES.

SEC. 32. The amount of income, war-profits, and excess-profits taxes imposed by foreign countries or possessions of the United States shall be allowed as a credit against the tax, to the extent provided in section 131.

TAXES WITHHELD AT SOURCE.

SEC. 33. The amount of tax withheld at the source under section 144 shall be allowed as a credit against the tax.

ERRONEOUS PAYMENTS.

SEC 34. (*a*) **Credit for Overpayments.**—For credit against the tax of overpayments of taxes imposed by this title for other taxable years, see section 322.

(*b*) **Fiscal Year Ending in 1928.**—For credit against the tax of amounts of tax paid for a fiscal year beginning in 1927 and ending in 1928, see section 132.

PART IV

ACCOUNTING PERIODS AND METHODS OF ACCOUNTING.

GENERAL RULE.

SEC. 41. The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year. (For use of inventories, see section 22(*c*).)

PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

SEC. 42. The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless,

under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period.

PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

SEC. 43. The deductions and credits provided for in this title shall be taken for the taxable year in which "paid or accrued" or "paid or incurred," dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period.

INSTALLMENT BASIS.

SEC. 44. (*a*) **Dealers in Personal Property.**—Under regulations prescribed by the Commissioner with the approval of the Secretary, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit realized or to be realized when payment is completed, bears to the total contract price.

(*b*) **Sales of Realty and Casual Sales of Personalty.**—In the case (1) of a casual sale or other casual disposition of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year), for a price exceeding $1,000, or (2) of a sale or other disposition of real property, if in either case the initial payments do not exceed 40 per centum of the selling price, the income may. under regulations prescribed by the Commissioner with the approval of the Secretary, be returned on the basis and in the manner above prescribed in this section. As used in this section the term "initial payments" means the payments received in cash or property other than evidences of indebtedness of the purchaser during the taxable period in which the sale or other disposition is made.

(*c*) **Change from Accrual to Installment Basis.**—If a taxpayer entitled to the benefits of subsection (*a*) elects for any taxable year to report his net income on the installment basis, then in computing his income for the year of change or any subsequent year, amounts actually received during any such year on account of sales or other dispositions of property made in any prior year shall not be excluded.

(*d*) **Gain or Loss upon Disposition of Installment Obligations.**—If an installment obligation is satisfied at other than its face value or distributed, transmitted, sold, or otherwise disposed of, gain or loss shall result to the extent of the difference between the basis of the obligation and (1) in the case of satisfaction at other than face value or a sale or exchange—the amount realized, or (2) in case of a distribution, transmission, or disposition otherwise than by sale or exchange—the fair market value of the obligation at the time of such distribution, transmission, or disposition. The basis of the obligation shall be the excess of the face value of the obligation over an amount equal to the income which would be returnable were the obligation satisfied in full.

ALLOCATION OF INCOME AND DEDUCTIONS.

SEC. 45. In any case of two or more trades or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Commissioner is authorized to distribute, apportion, or allocate gross income or deductions between or among such trades or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such trades or businesses.

CHANGE OF ACCOUNTING PERIOD.

SEC. 46. If a taxpayer changes his accounting period from fiscal year to calendar year, from calendar year to fiscal year, or from one fiscal year to another, the net income shall, with the approval of the Commissioner, be computed on the basis of such new accounting period, subject to the provisions of section 47.

RETURNS FOR A PERIOD OF LESS THAN TWELVE MONTHS.

SEC. 47. (*a*) **Returns for Short Period Resulting from Change of Accounting Period.**—If a taxpayer, with the approval of the Commissioner, changes the basis of computing net income from fiscal year to calendar year a separate return shall be made for the period between the close of the last fiscal year for which return was made and the following December 31. If the change is from calendar year to fiscal year, a separate return shall be made for the period between the close of the last calendar year for which return was made and the date designated as the close of the fiscal year. If the change is from one fiscal year to another fiscal year a separate return shall be made for the period between the close of the former fiscal year and the date designated as the close of the new fiscal year.

(*b*) **Income Computed on Basis of Short Period.**—Where a separate return is made under subsection (*a*) on account of a change in the accounting period, and in all other cases where a separate return is required or permitted, by regulations prescribed by the Commissioner with the approval of the Secretary, to be made for a fractional part of a year, then the income shall be computed on the basis of the period for which separate return is made.

(*c*) **Income Placed on Annual Basis.**—If a separate return is made under subsection (*a*) on account of a change in the accounting period, the net income, computed on the basis of the period for which separate return is made, shall be placed on an annual basis by multiplying the amount thereof by twelve and dividing by the number of months included in the period for which the separate return is made. The tax shall be such part of the tax computed on such annual basis as the number of months in such period is of twelve months.

(*d*) **Capital Net Gains and Losses—Earned Income.**—The Commissioner with the approval of the Secretary shall by regulations prescribe the method of applying the provisions of subsections (*b*) and (*c*) (relating to computing income on the basis of a short period, and placing such income on an annual basis) to cases where the taxpayer makes a separate return under subsection (*a*) on account of a change in the accounting period, and it appears that for the period for which the return is so made he has derived a capital net gain, or sustained a capital net loss, or received earned income.

(*e*) **Reduction of Credits Against Net Income.**—In the case of a return made for a fractional part of a year, except a return made under subsection (*a*), on account of a change in the accounting period, the personal exemption and credit for dependents, and the specific credit for corporations, shall be reduced respectively to amounts which bear the same ratio to the full credits provided as the number of months in the period for which return is made bears to twelve months.

(*f*) **Closing of Taxable Year in Case of Jeopardy.**—For closing of taxable year in case of jeopardy, see section 147.

PART V

RETURNS AND PAYMENT OF TAX.

INDIVIDUAL RETURNS.

SEC. 51. (*a*) **Requirement.**—The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife;
(2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife; and
(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

(*b*) **Husband and Wife.**—If a husband and wife living together have an aggregate net income for the taxable year of $3,500 or over, or an aggregate gross income for such year of $5,000 or over—
(1) Each shall make such a return, or
(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.

(*c*) **Persons under Disability.**—If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer.

(*d*) **Fiduciaries.**—For returns to be made by fiduciaries, see section 143.

CORPORATION RETURNS.

SEC. 52. (*a*) **Requirement.**—Every corporation subject to taxation under this title shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer. In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control.

(*b*) **Consolidated Returns.**—For provision as to consolidated returns of affiliated corporations, see sections 141 and 142.

TIME AND PLACE FOR FILING RETURNS.

SEC. 53. (*a*) **Time for Filing.**

(1) GENERAL RULE.—Returns made on the basis of the calendar year shall be made on or before the 15th day of March following the close of the calendar year. Returns made on the basis of a fiscal year shall be made on or before the 15th day of the third month following the close of the fiscal year.

(2) EXTENSION OF TIME.—The Commissioner may grant a reasonable extension of time for filing returns, under such rules and regulations as he shall prescribe with the approval of the Secretary. Except in the case of taxpayers who are abroad, no such extension shall be for more than six months.

(*b*) **To Whom Return Made.**

(1) INDIVIDUALS.—Returns (other than corporation returns) shall be made to the collector for the district in which is located the legal residence or principal place of business of the person making the return, or, if he has no legal residence or principal place of business in the United States, then to the collector at Baltimore, Maryland.

(2) CORPORATIONS.—Returns of corporations shall be made to the collector of the district in which is located the principal place of business or principal office or agency of the corporation, or, if it has no principal place of business or principal office or agency in the United States, then to the collector at Baltimore, Maryland.

PUBLICITY OF RETURNS.

SEC. 55. Returns made under this title shall be open to inspection in the same manner, to the same extent, and subject to the same provisions of law, including penalties, as returns made under Title II of the Revenue Act of 1926.

PAYMENT OF TAX.

SEC. 56. (*a*) **Time of Payment.**—The total amount of tax imposed by this title shall be paid on the fifteenth day of March following the close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on the fifteenth day of the third month following the close of the fiscal year.

(*b*) **Installment Payments.**—The taxpayer may elect to pay the tax in four equal installments, in which case the first installment shall be paid on the date prescribed for the payment of the tax by the taxpayer, the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the sixth month, and the fourth installment on the fifteenth day of the ninth month, after such date. If any installment is not paid on or before the date fixed for its payment, the whole amount of the tax unpaid shall be paid upon notice and demand from the collector.

(*c*) **Extension of Time for Payment.**—At the request of the taxpayer, the Commissioner may extend the time for payment of the amount determined as the tax by the taxpayer, or any installment thereof, for a period not to exceed six months from the date prescribed for the payment of the tax or an installment thereof. In such case the amount in respect of which the extension is granted shall be paid on or before the date of the expiration of the period of the extension.

(*d*) **Voluntary Advance Payment.**—A tax imposed by this title, or any installment thereof, may be paid, at the election of the taxpayer, prior to the date prescribed for its payment.

(*e*) **Advance Payment in Case of Jeopardy.**—For advance payment in case of jeopardy, see section 147.

(*f*) **Tax Withheld at Source.**—For requirement of withholding tax at the source in the case of nonresident aliens and foreign corporations, and in the case of so-called "tax-free covenant bonds," see sections 144 and 145.

(*g*) **Fractional Parts of Cent.**—In the payment of any tax under this title a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to 1 cent.

(*h*) **Receipts.**—Every collector to whom any payment of any income tax is made shall upon request give to the person making such payment a full written or printed receipt, stating the amount paid and the particular account for which such payment was made; and whenever any debtor pays taxes on account of payments made or to be made by him to separate creditors the collector shall, if requested by such debtor, give a separate receipt for the tax paid on account of each creditor in such form that the debtor can conveniently produce such receipts separately to his several creditors in satisfaction of their respective demands up to the amounts stated in the receipts; and such receipt shall be sufficient evidence in favor of such debtor to justify him in withholding from his next payment to his creditor the amount therein stated; but the creditor may, upon giving to his debtor a full written receipt acknowledging the payment to him of any sum actually paid and accepting the amount of tax paid as aforesaid (specifying the same) as a further satisfaction of the debt to that amount, require the surrender to him of such collector's receipt.

SUPPLEMENT A

RATES OF TAX.

[Supplementary to Subtitle B, Part I]

CAPITAL NET GAINS AND LOSSES.

SEC. 101. (*a*) **Tax in Case of Capital Net Gain.**—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election

of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

(*b*) **Tax in Case of Capital Net Loss.**—In the case of any taxpayer, other than a corporation, who for any taxable year sustains a capital net loss (as hereinafter defined in this section), there shall be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted, and the total tax shall be this amount minus 12½ per centum of the capital net loss; but in no case shall the tax of a taxpayer who has sustained a capital net loss be less than the tax computed without regard to the provisions of this section.

(*c*) **Definitions.**—For the purposes of this title—

(1) "Capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921.

(2) "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

(3) "Capital deductions" means such deductions as are allowed by section 23 for the purpose of computing net income, and are property allocable to or chargeable against capital assets sold or exchanged during the taxable year.

(4) "Ordinary deductions" means the deductions allowed by section 23 other than capital losses and capital deductions.

(5) "Capital net gain" means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gains.

(6) "Capital net loss" means the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain.

(7) "Ordinary net income" means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions.

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

(A) In the determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112(*g*) of this title or under the provisions of section 203(*c*) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

(*d*) **Collection and Payment of Tax.**—The total tax determined under subsection (*a*) or (*b*) shall be collected and paid in the same manner, at the same time, and subject to the same provisions of law, including penalties, as other taxes under this title.

SALE OF MINES AND OIL OR GAS WELLS.

SEC. 102. (*a*) In the case of a bona fide sale of mines, oil or gas wells, or any interest therein, where the principal value of the property has been demonstrated by prospecting or exploration and discovery work done by the taxpayer, the portion of the tax imposed by section 12 of this title attributable to such sale shall not exceed 16 per centum of the selling price of such property or interest.

(*b*) For limitation to 12½ per centum rate of tax, see section 101.

EXEMPTIONS FROM TAX ON CORPORATIONS.

SEC. 103. The following organizations shall be exempt from taxation under this title—

(1) Labor, agricultural, or horticultural organizations;

(2) Mutual savings banks not having a capital stock represented by shares;

(3) Fraternal beneficiary societies, orders, or associations, (A) operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system; and (B) providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association or their dependents;

(4) Domestic building and loan associations substantially all the business of which is confined to making loans to members; and cooperative banks without capital stock organized and operated for mutual purposes and without profit;

(5) Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(6) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(7) Business leagues, chambers of commerce, real estate boards, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(8) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes;

(9) Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder;

(10) Benevolent life insurance associations of a purely local character, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations; but only if 85 per centum or more of the income consists of amounts collected from members for the sole purpose of meeting losses and expenses;

(11) Farmers' or other mutual hail, cyclone, casualty, or fire insurance companies or associations (including interinsurers and reciprocal underwriters) the income of which is used or held for the purpose of paying losses or expenses;

(12) Farmers', fruit growers', or like associations organized and operated on a cooperative basis (*a*) for the purpose of marketing the products of members or other producers, and turning back to them the proceeds of sales, less the necessary marketing expenses, on the basis of either the quantity or the value of the products furnished by them, or (*b*) for the purpose of purchasing supplies and equipment for the use of members or other persons, and turning over such supplies and equipment to them at actual cost, plus necessary expenses. Exemption shall not be denied any such association because it has capital stock, if the dividend rate of such stock is fixed at not to exceed the legal rate of interest in the State of incorporation or 8 per centum per annum, whichever is greater, on the value of the consideration for which the stock was issued, and if substantially all such stock (other than nonvoting preferred stock, the owners of which are not entitled or permitted to participate, directly or indirectly, in the profits of the association, upon dissolution or otherwise, beyond the fixed dividends) is owned by producers who market their products or purchase their supplies and equipment through the association; nor shall exemption be denied any such association because there is accumulated and maintained by it a reserve required by State law or a reasonable reserve for any necessary purpose. Such an association may market the products of nonmembers in an amount the value of which does not exceed the value of the products marketed for members, and may purchase supplies and equipment for nonmembers in an amount the value of which does not exceed the value of the supplies and equipment purchased for members, provided the value of the purchases made for persons who are neither members nor producers does not exceed 15 per centum of the value of all its purchases;

(13) Corporations organized by an association exempt under the provisions of paragraph (12), or members thereof, for the purpose of financing the ordinary crop operations of such members or other producers, and operated in conjunction with such association. Exemption shall not be denied any such corporation because it has capital stock, if the dividend rate of such stock is fixed at not to exceed the legal rate of interest in the State of incorporation or 8 per centum per annum, whichever is greater, on the value of the consideration for which the stock was issued, and if substantially all such stock (other than nonvoting preferred stock, the owners of which are not entitled or permitted to participate, directly or indirectly, in the profits of the corporation, upon dissolution or otherwise, beyond the fixed dividends) is owned by such association, or members thereof; nor shall exemption be denied any such corporation because there is accumulated and maintained by it a reserve required by State law or a reasonable reserve for any necessary purpose;

(14) Corporations organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by this title;

(15) Federal land banks, national farm-loan associations, and Federal intermediate credit banks, as provided in the Federal Farm Loan Act, as amended;

(16) Voluntary employees' beneficiary associations providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents, if (A) no part of their net earnings inures (other than through such payments) to the benefit of any private shareholder or individual, and (B) 85 per centum or more of the income consists of amounts collected from members for the sole purpose of making such payments and meeting expenses;

(17) Teachers' retirement fund associations of a purely local character, if (A) no part of their net earnings inures (other than through payment of retirement benefits) to the benefit of any private shareholder or individual, and (B) the income consists solely of amounts received from public taxation, amounts received from assessments upon the teaching salaries of members, and income in respect of investments.

ACCUMULATION OF SURPLUS TO EVADE SURTAXES.

SEC. 104. (*a*) If any corporation, however created or organized, is formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed, there shall be levied, collected, and paid for each taxable year upon the net income of such corporation a tax equal to 50 per centum of the amount thereof, which shall be in addition to the tax imposed by section 13 and shall be computed, collected, and paid upon the same basis and in the same manner and subject to the same provisions of law, including penalties, as that tax.

(*b*) The fact that any corporation is a mere holding or investment company, or that the gains or profits are permitted to accumulate beyond the reasonable needs of the business, shall be prima facie evidence of a purpose to escape the surtax.

(*c*) As used in this section the term "net income" means the net income as defined in section 21, increased by the sum of the amount of the dividend deduction allowed under section 23(*p*) and the amount of the interest on obligations of the United States issued after September 1, 1917, which would be subject to tax in whole or in part in the hands of an individual owner.

(*d*) The tax imposed by this section shall not apply if all the shareholders of the corporation include (at the time of filing their returns) in their gross income their entire distributive shares, whether distributed or not, of the net income of the corporation for such year. Any amount so included in the gross income of a shareholder shall be treated as a dividend received. Any subsequent distribution made by the corporation out of the earnings or profits for such taxable year shall, if distributed to any shareholder who has so included in his gross income his distributive share, be exempt from tax in the amount of the share so included.

TAXABLE PERIOD EMBRACING YEARS WITH DIFFERENT LAWS.

SEC. 105. If it is necessary to compute the tax for a period beginning in one calendar year (hereinafter in this section called "first calendar year") and ending in the following calendar year (hereinafter in this section called "second calendar year") and the law applicable to the second calendar year is different from the law applicable to the first calendar year, then the tax under this title for the period ending during the second calendar year shall be the sum of: (1) the same proportion of a tax for the entire period, determined under the law applicable to the first calendar year and at the rates for such year, which the portion of such period falling within the first calendar year is of the entire period; and (2) the same proportion of a tax for the entire period, determined under the law applicable to the second calendar year and at the rates for such year, which the portion of such period falling within the second calendar year is of the entire period.

SUPPLEMENT B

COMPUTATION OF NET INCOME.

[Supplementary to Subtitle B, Part II]

DETERMINATION OF AMOUNT OF GAIN OR LOSS

SEC. 111. (*a*) **Computation of Gain or Loss.**—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

(*b*) **Adjustment of Basis.**—In computing the amount of gain or loss under subsection (*a*)—

(1) Proper adjustment shall be made for any expenditure, receipt, loss, or other item, properly chargeable to capital account, and

(2) The basis shall be diminished by the amount of the deductions for exhaustion, wear and tear, obsolescence, amortization, and depletion which have since the acquisition of the property been allowable in respect of such property under this Act or prior income tax laws; but in no case shall the amount of the diminution in respect of depletion exceed a depletion deduction computed without reference to discovery value under section 114(*b*)(2) or to percentage depletion under section 114(*b*)(3). In addition, if the property was acquired before March 1, 1913, the basis (if other than the fair market value as of March 1, 1913) shall be diminished in the amount of exhaustion, wear and tear, obsolescence, and depletion actually sustained before such date, and

(3) In the case of stock the basis shall be diminished by the amount of distributions previously made in respect of such stock, to the extent provided under the law applicable to the year in which the distribution was made.

(*c*) **Amount Realized.**—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

(*d*) **Recognition of Gain or Loss.**—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 112.

(*e*) **Installment Sales.**—Nothing in this section shall be construed to prevent (in the case of property sold under contract providing for payment in installments) the taxation of that portion of any installment payment representing gain or profit in the year in which such payment is received.

RECOGNITION OF GAIN OR LOSS,

Sec. 112. (*a*) **General Rule.**—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(*b*) **Exchanges Solely in Kind.**

(1) Property Held for Productive Use or Investment.—No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment.

(2) Stock for Stock of Same Corporation.—No gain or loss shall be recognized if common stock in a corporation is exchanged solely for common stock in the same corporation, or if preferred stock in a corporation is exchanged solely for preferred stock in the same corporation.

(3) Stock for Stock on Reorganization.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) Same—Gain of Corporation.—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(5) Transfer to Corporation Controlled by Transferor.—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by

each is substantially in proportion to his interest in the property prior to the exchange.

(*c*) **Gain from Exchanges Not Solely in Kind.**

(1) If an exchange would be within the provisions of subsection) (*b*) (1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

(2) If a distribution made in pursuance of a plan of reorganization is within the provisions of paragraph (1) of this subsection but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property.

(*d*) **Same—Gain of Corporation.**—If an exchange would be within the provisions of subsection (*b*)(4) of this section if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed.

(*e*) **Loss from Exchanges Not Solely in Kind.**—If an exchange would be within the provisions of subsection (*b*)(1) to (5), inclusive, of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain or loss, but also of other property or money, then no loss from the exchange shall be recognized.

(*f*) **Involuntary Conversions.**—If property (as a result of its destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof) is compulsorily or involuntarily converted into property similar or related in service or use to the property so converted, or into money which is forthwith in good faith, under regulations prescribed by the Commissioner with the approval of the Secretary, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain or loss shall be recognized. If any part of the money is not so expended, the gain, if any, shall be recognized, but in an amount not in excess of the money which is not so expended.

(*g*) **Distribution of Stock on Reorganization.**—If there is distributed, in pursuance of a plan of reorganization, to a shareholder in a corporation a party to the reorganization, stock or securities in such corporation or in another corporation a party to the reorganization, without the surrender by such shareholder of stock or securities in such a corporation, no gain to the distributee from the receipt of such stock or securities shall be recognized.

(*h*) **Same—Effect on Future Distributions.**—The distribution, in pursuance of a plan of reorganization, by or on behalf of a corporation a party to the reorganization, of its stock or securities or stock or securities in a corporation a party to the reorganization, shall not be considered a distribution of earnings

or profits within the meaning of section 115(*b*) for the purpose of determining the taxability of subsequent distributions by the corporation.

(*i*) **Definition of Reorganization.**—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(*j*) **Definition of Control.**—As used in this section the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

DISTRIBUTIONS BY CORPORATIONS.

SEC. 115. (*a*) **Definition of Dividend.**—The term "dividend" when used in this title (except in section 203(*a*)(4) and section 208(*c*)(1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, out of its earnings or profits accumulated after February 28, 1913.

(*b*) **Source of Distributions.**—For the purposes of this Act every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits. Any earnings or profits accumulated, or increase in value of property accrued, before March 1, 1913, may be distributed exempt from tax, after the earnings and profits accumulated after February 28, 1913, have been distributed, but any such tax-free distribution shall be applied against and reduce the basis of the stock provided in section 113.

(*c*) **Distributions in Liquidation.**—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. In the case of amounts distributed in partial liquidation (other than a distribution with the provisions of section 112(*h*) of stock or securities in connection with a reorganization) the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits within the meaning of subsection (*b*) of this section for the purpose of determining the taxability of subsequent distributions by the corporation.

(*d*) **Other Distributions from Capital.**—If any distribution (not in partial or complete liquidation) made by a corporation to its shareholders is not out of increase in value of property accrued before March 1, 1913, and is not out of earnings or profits, then the amount of such distribution shall be applied against and reduce the basis of the stock provided in section 113, and if in excess of such basis, such excess shall be taxable in the same manner as a gain from the sale or exchange of property. The provisions of this subsection shall also apply to distributions from depletion reserves based on the discovery value of mines.

(*e*) **Distributions by Personal Service Corporations.**—Any distribution made by a corporation, which was classified as a personal service corporation

under the provisions of the Revenue Act of 1918 or the Revenue Act of 1921, out of its earnings or profits which were taxable in accordance with the provisions of section 218 of the Revenue Act of 1918 or section 218 of the Revenue Act of 1921, shall be exempt from tax to the distributees.

(*f*) **Stock Dividends.**—A stock dividend shall not be subject to tax.

(*g*) **Redemption of Stock.**—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend. In the case of the cancellation or redemption of stock not issued as a stock dividend this subsection shall apply only if the cancellation or redemption is made after January 1, 1926.

(*h*) **Definition of Partial Liquidation.**—As used in this section the term "amounts distributed in partial liquidation" means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock.

EXCLUSIONS FROM GROSS INCOME.

SEC. 116. In addition to the items specified in section 22(*b*), the following items shall not be included in gross income and shall be exempt from taxation under this title:

(*a*) **Earned Income from Sources Without United States.**—In the case of an individual citizen of the United States, a bona fide nonresident of the United States for more than six months during the taxable year, amounts received from sources without the United States if such amounts constitute earned income as defined in section 31; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

(*b*) **Teachers in Alaska and Hawaii.**—In the case of an individual employed by Alaska or Hawaii or any political subdivision thereof as a teacher in any educational institution, the compensation received as such. This subsection shall not exempt compensation paid directly or indirectly by the Government of the United States.

(*c*) **Income of Foreign Governments.**—The income of foreign governments received from investments in the United States in stocks, bonds, or other domestic securities, owned by such foreign governments, or from interest on deposits in banks in the United States of moneys belonging to such foreign governments, or from any other source within the United States.

(*d*) **Income of States, Municipalities, etc.**—Income derived from any public utility or the exercise of any essential governmental function and accruing to any State, Territory, or the District of Columbia, or any political subdivision of a state or Territory, or income accruing to the Government of any possession of the United States, or any political subdivision thereof.

Whenever any State, Territory, or the District of Columbia, or any political subdivision of a State or Territory, prior to September 8, 1916, entered in good faith into a contract with any person, the object and purpose of which is to acquire, construct, operate, or maintain a public utility—

(1) If by the terms of such contract the tax imposed by this title is to be paid out of the proceeds from the operation of such public utility, prior to any division of such proceeds between the person and the State, Territory, political subdivision, or the District of Columbia, and if, but for the imposition of the tax imposed by this title, a part of such proceeds for the taxable year would accrue directly to or for the use of such State, Territory, political subdivision, or the District of Columbia, then a tax upon the net income from the operation of such public utility shall be levied, assessed, collected and paid in the manner

and at the rates prescribed in this title, but there shall be refunded to such State, Territory, political subdivision, or the District of Columbia (under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary) an amount which bears the same relation to the amount of the tax as the amount which (but for the imposition of the tax imposed by this title) would have accrued directly to or for the use of such State, Territory, political subdivision, or the District of Columbia, bears to the amount of the net income from the operation of such public utility for such taxable year.

(2) If by the terms of such contract no part of the proceeds from the operation of the public utility for the taxable year would, irrespective of the tax imposed by this title, accrue directly to or for the use of such State, Territory, political subdivision, or the District of Columbia, then the tax upon the net income of such person from the operation of such public utility shall be levied, assessed, collected, and paid in the manner and at the rates prescribed in this title.

(*e*) **Bridges to Be Acquired by State or Political Subdivision.**—Whenever any State or political subdivision thereof, in pursuance of a contract to which it is not a party entered into before the enactment of this Act, is to acquire a bridge—

(1) If by the terms of such contract the tax imposed by this title is to be paid out of the proceeds from the operation of such bridge prior to any division of such proceeds, and if, but for the imposition of the tax imposed by this title, a part of such proceeds, for the taxable year would accrue directly to or for the use of or would be applied for the benefit of such State or political subdivision, then a tax upon the net income from the operation of such bridge shall be levied, assessed, collected, and paid in the manner and at the rates prescribed in this title, but there shall be refunded to such state or political subdivision (under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary) an amount which bears the same relation to the amount of the tax as the amount which (but for the imposition of the tax imposed by this title) would have accrued directly to or for the use of or would be applied for the benefit of such State or political subdivision, bears to the amount of the net income from the operation of such bridge for such taxable year. No such refund shall be made unless the entire amount of the refund is to be applied in part payment for the acquisition of such bridge.

(2) If by the terms of such contract no part of the proceeds from the operation of the bridge for the taxable year would, irrespective of the tax imposed by this title, accrue directly to or for the use of or be applied for the benefit of such State or political subdivision, then the tax upon the net income from the operation of such bridge shall be levied, assessed, collected, and paid in the manner and at the rates prescribed in this title.

(*f*) **Dividends from "China Trade Act" Corporation.**—In the case of a person, amounts distributed as dividends to or for his benefit by a corporation organized under the China Trade Act, 1922, if, at the time of such distribution, he is a resident of China, and the equitable right to the income of the shares of stock of the corporation is in good faith vested in him.

(*g*) **Shipowners' Protection and Indemnity Associations.**—The receipts of shipowners' mutual protection and indemnity associations not organized for profit, and no part of the net earnings of which inures to the benefit of any private shareholder; but such corporations shall be subject as other persons to the tax upon their net income from interest. dividends. and rents.

NET LOSSES

SEC. 117. (*a*) **Definition of "Net Loss."**—As used in this section the term "net loss" means the excess of the deductions allowed by this title over the gross income, with the following exceptions and limitations:

(1) NON-BUSINESS DEDUCTIONS.—Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by

the taxpayer shall be allowed only to the extent of the amount of the gross income not derived from such trade or business;

(2) CAPITAL LOSSES.—In the case of a taxpayer other than a corporation, deductions for capital losses otherwise allowed by law shall be allowed only to the extent of the capital gains;

(3) DEPLETION.—The deduction for depletion shall not exceed the amount which would be allowable if computed without reference to discovery value, or to percentage depletion under section 114(*b*)(3);

(4) DIVIDENDS.—The deduction provided for in section 23(*p*) of amounts received as dividends shall not be allowed;

(5) INTEREST.—There shall be included in computing gross income the amount of interest received free from tax under this title, decreased by the amount of interest paid or accrued which is not allowed as a deduction by section 23(*b*);

(6) NET LOSS NOT TO PRODUCE NET LOSS.—In computing the net loss for any taxable year a net loss for a prior year shall not be allowed as a deduction,

(*b*) **Net Loss As a Deduction.**—If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (hereinafter in this section called "second year"), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called "third year"); the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary.

(*c*) **Capital Net Gain or Loss in Second Year.**

(1) CAPITAL NET LOSS.—If in the second year the taxpayer (other than a corporation) sustains a capital net loss, the deduction allowed by subsection (*b*) of this section shall first be applied as a deduction in computing the ordinary net income for such year. If the deduction is in excess of the ordinary net income (computed without such deduction) then the amount of such excess shall be allowed as a deduction in computing net income for the third year.

(2) CAPITAL NET GAIN.—If in the second year the taxpayer (other than a corporation) has a capital net gain, the deduction allowed by subsection (*b*) of this section shall first be applied as a deduction in computing the ordinary net income for such year. If the deduction is in excess of the ordinary net income (computed without such deduction) the amount of such excess shall next be applied against the capital net gain for such year, and if in excess of the capital net gain the amount of that excess shall be allowed as a deduction in computing net income for the third year.

(*d*) **Capital Net Gain or Loss in Third Year.**—If any portion of a net loss is allowed as a deduction in computing net income for the third year, under the provisions of either subsection (*b*) or (*c*) of this section and the taxpayer (other than a corporation) has in such year a capital net gain or a capital net loss, then the method of allowing such deduction in such third year shall be the same as provided in subsection (*c*).

(*e*) **Net Loss for 1926 or 1927.**—If for the taxable year 1926 or 1927 a taxpayer sustained a net loss within the provisions of the Revenue Act of 1926, the amount of such net loss shall be allowed as a deduction in computing net income for the two succeeding taxable years to the same extent and in the same manner as a net loss sustained for one taxable year is, under this Act, allowed as a deduction for the two succeeding taxable years.

(*f*) **Fiscal Year Returns.**—If a taxpayer makes return for a period beginning in one calendar year (hereinafter in this subsection called "first calendar year") and ending in the following calendar year (hereinafter in this subsection called "second calendar year") and the law applicable to the second calendar year is different from the law applicable to the first calendar year, then his net loss for the period ending during the second calendar year shall be the sum of: (1) the same proportion of a net loss for the entire period, deter-

mined under the law applicable to the first calendar year, which the portion of such period falling within such calendar year is of the entire period; and (2) the same proportion of a net loss for the entire period, determined under the law applicable to the second calendar year, which the portion of such period falling within such calendar year is of the entire period.

LOSS ON SALE OF STOCK OR SECURITIES

SEC. 118. In the case of any loss claimed to have been sustained in any sale or other disposition of shares of stock or securities where it appears that within thirty days before or after the date of such sale or other disposition the taxpayer has acquired (otherwise than by bequest or inheritance) or has entered into a contract or option to acquire substantially identical property, and the property so acquired is held by the taxpayer for any period after such sale or other disposition, no deduction for the loss shall be allowed under section 23(*e*)(2) of this title; nor shall such deduction be allowed under section 23(*f*) unless the claim is made by a corporation, a dealer in stocks or securities, and with respect to a transaction made in the ordinary course of its business. If such acquisition or the contract or option to acquire is to the extent of part only of substantially identical property, then only a proportionate part of the loss shall be disallowed.

UNLIMITED DEDUCTION FOR CHARITABLE AND OTHER CONTRIBUTIONS

SEC. 120. In the case of an individual if in the taxable year and in each of the ten preceding taxable years the amount of the contributions or gifts described in section 23(*n*) plus the amount of income, war-profits, or excess-profits taxes paid during such year in respect of preceding taxable years, exceeds 90 per centum of the taxpayer's net income for each such year, as computed without the benefit of section 23(*n*), then the 15 per centum limit imposed by such section shall not be applicable.

FIDUCIARY RETURNS.

SEC. 143. (*a*) **Requirement of Return.**—Every fiduciary (except a receiver appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for any of the following individuals, estates, or trusts for which he acts, stating specifically the items of gross income thereof and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife;

(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income;

(4) Every estate or trust the net income of which for the taxable year is $1,500 or over;

(5) Every estate or trust the gross income of which for the taxable year is $5,000 or over, regardless of the amount of the net income; and

(6) Every estate or trust of which any beneficiary is a nonresident alien.

(*b*) **Joint Fiduciaries.**—Under such regulations as the Commissioner with the approval of the Secretary may prescribe a return made by one of two or more joint fiduciaries and filed in the office of the collector of the district where such fiduciary resides shall be sufficient compliance with the above requirement. Such fiduciary shall make oath (1) that he has sufficient knowledge of the affairs of the individual, estate or trust for which the return is made, to enable him to make the return, and (2) that the return is, to the best of his knowledge and belief, true and correct.

(*c*) **Law Applicable to Fiduciaries.**—Any fiduciary required to make a return under this title shall be subject to all the provisions of law which apply to individuals.

INFORMATION AT SOURCE

SEC. 148. (*a*) **Payments of $1,500 or More.**—All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, and employers, making payment to another person, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income (other than payments described in section 149(*a*) or 150), of $1,500 or more in any taxable year, or, in the case of such payments made by the United States, the officers or employees of the United States having information as to such payments and required to make returns in regard thereto by the regulations hereinafter provided for, shall render a true and accurate return to the Commissioner, under such regulations and in such form and manner and to such extent as may be prescribed by him with the approval of the Secretary, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment.

(*b*) **Returns Regardless of Amount of Payment.**—Such returns may be required, regardless of amounts, (1) in the case of payments of interest upon bonds, mortgages, deeds of trust, or other similar obligations of corporations, and (2) in the case of collections of items (not payable in the United States) of interest upon the bonds of foreign countries and interest upon the bonds of and dividends from foreign corporations by persons undertaking as a matter of business or for profit the collection of foreign payments of such interest or dividends by means of coupons, checks, or bills of exchange.

SUPPLEMENT E

ESTATES AND TRUSTS.

IMPOSITION OF TAX

SEC. 161. (*a*) **Application of Tax.**—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(*b*) **Computation and Payment.**—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor). For return made by beneficiary, see section 143.

NET INCOME

SEC. 162. The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(*a*) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(*n*) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 (*n*), or is to be used exclusively for religious, charitable, scientific, literary, or educational

purposes, or for the prevention of cruelty to children or animals, or for the estabishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

(*b*) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (*c*) of this section in the same or any succeeding taxable year;

(*c*) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

CREDITS AGAINST NET INCOME

SEC. 163. (*a*) **Credits of Estate or Trust.**—For the purpose of the norma tax the estate or trust shall be allowed the same personal exemption as is allowed to a single person under section 25 (*c*), and, if no part of the income of the estate or trust is included in computing the net income of any legatee, heir or beneficiary, then in addition the same credits against net income for dividends and interest as are allowed by section 25 (*a*) and (*b*).

(*b*) **Credits of Beneficiary.**—If any part of the income of an estate or trust is included in computing the net income of any legatee, heir, or beneficiary, such legatee, heir, or beneficiary shall, for the purpose of the normal tax, be allowed as credits against net income, in addition to the credits allowed to him under section 25, his proportionate share of such amounts of dividends and interest specified in section 25(*a*) and (*b*) as are, under this Supplement, required to be included in computing his net income. Any remaining portion of such amounts specified in section 25(*a*) and (*b*) shall, for the purpose of the normal tax, be allowed as credits to the estate or trust.

REVOCABLE TRUSTS

SEC. 166. Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the turst, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.

SUPPLEMENT F

PARTNERSHIPS.

PARTNERSHIP NOT TAXABLE.

SEC. 181. Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

TAX OF PARTNERS.

SEC. 182. (*a*) **General Rule.**—There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. If the taxable

year of a partner is different from that of the partnership, the amount so included shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year.

(*b*) **Partnership Year Embracing Calendar Years with Different Laws.**—If a fiscal year of a partnership begins in one calendar year and ends in another calendar year, and the law applicable to the second calendar year is different from the law applicable to the first calendar year, then

(1) The rates for the calendar year during which such fiscal year begins shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year, and

(2) the rates for the calendar year during which such fiscal year ends shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year.

In such cases the part of such income subject to the rates in effect for the most recent calendar year shall be added to the other income of the taxpayer subject to such rates and the resulting amount shall be placed in the lower brackets of the rate schedule applicable to such year, and the part of such income subject to the rates in effect for the next preceding calendar year shall be placed in the next higher brackets of the rate schedule applicable to such year.

COMPUTATION OF PARTNERSHIP INCOME.

SEC. 183. The net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual, except that the so-called "charitable contribution" deduction provided in section 23(*n*) shall not be allowed.

CREDITS AGAINST NET INCOME.

SEC. 184. The partner shall, for the purpose of the normal tax, be allowed as a credit against his net income, in addition to the credits allowed to him under section 25, his proportionate share of such amounts of dividends and interest specified in section 25(*a*) and (*b*) as are received by the partnership.

EARNED INCOME.

SEC. 185. In the case of the members of a partnership the proper part of each share of the net income which consists of earned income shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary and shall be separately shown in the return of the partnership and shall be taxed to the member as provided in this Supplement.

CAPITAL NET GAINS AND LOSSES.

SEC. 186. In the case of the members of a partnership the proper part of each share of the net income which consists, respectively, of ordinary net income, capital net gain, or capital net loss, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the partnership and shall be taxed to the member as provided in this Supplement, but at the rates and in the manner provided in section 101(*a*) and (*b*), relating to capital net gains and losses.

NET LOSSES.

SEC. 187. The benefit of the special deduction for net losses allowed by section 117 shall be allowed to the members of a partnership under regulations prescribed by the Commissioner with the approval of the Secretary.

TAXES OF FOREIGN COUNTRIES AND POSSESSIONS OF UNITED STATES.

SEC. 188. The amount of income, war-profits, and excess-profits taxes imposed by foreign countries or possessions of the United States shall be allowed as a credit against the tax of the member of a partnership to the extent provided in section 131.

PARTNERSHIP RETURNS.

SEC. 189. Every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this title, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners.

SUPPLEMENT H

NONRESIDENT ALIEN INDIVIDUALS.

NORMAL TAX.

SEC. 211. (*a*) **General Rule.**—In the case of a nonresident alien individual who is not a resident of a contiguous country, the normal tax shall be 5 per centum of the amount of the net income in excess of the credits against net income allowed to such individual.

(*b*) **Aliens Resident in Contiguous Countries.**—In the case of an alien individual resident in a contiguous country, the normal tax shall be an amount equal to the sum of the following:

(1) ½ per centum of the amount by which the part of the net income attributable to wages, salaries, professional fees, or other amounts received as compensation for personal services actually performed in the United States, exceeds the personal exemption and credit for dependents; but the amount taxable at such ½ per centum rate shall not exceed $4,000;

(2) 2 per centum of the amount by which such part of the net income exceeds the sum of (A) the personal exemption and credit for dependents, plus (B) $4,000; but the amount taxable at such 2 per centum rate shall not exceed $4,000; and

(3) 4 per centum of the amount of the net income in excess of the sum of (A) the amount taxed under paragraphs (1) and (2) of this subsection plus (B) the total credits against net income allowed to such individual.

(*c*) **In Lieu of Normal Tax under Section 11.**—The tax imposed by this section shall be in lieu of the normal tax imposed by section 11.

GROSS INCOME.

SEC. 212. (*a*) **General Rule.**—In the case of a nonresident alien individual gross income includes only the gross income from sources within the United States.

(*b*) **Ships under Foreign Flag.**—The income of a nonresident alien individual which consists exclusively of earnings derived from the operation of a ship or ships documented under the laws of a foreign country which grants an equivalent exemption to citizens of the United States and to corporations organized in the United States, shall not be included in gross income and shall be exempt from taxation under this title.

DEDUCTIONS.

SEC. 213. (*a*) **General Rule.**—In the case of a nonresident alien individual the deductions shall be allowed only if and to the extent that they are connected with income from sources within the United States; and the proper apportionment and allocation of the deductions with respect to sources of

income within and without the United States shall be determined as provided in section 119, under rules and regulations prescribed by the Commissioner with the approval of the Secretary.

(*b*) **Losses.**

(1) The deduction, for losses not connected with the trade or business if incurred in transactions entered into for profit, allowed by section 23(*e*)(2) should be allowed whether or not connected with income from sources within the United States, but only if the profit, if such transaction had resulted in a profit, would be taxable under this title.

(2) The deduction for losses of property not connected with the trade or business if arising from certain casualties or theft, allowed by section 23(*e*)(3), shall be allowed whether or not connected with income from sources within the United States, but only if the loss is of property within the United States.

(*c*) **Charitable, etc., Contributions.**—The so-called "charitable contribution" deduction allowed by section 23(*n*) shall be allowed whether or not connected with income from sources within the United States, but only as to contributions or gifts made to domestic corporations, or to community chests, funds, or foundations, created in the United States, or to the vocational rehabilitation fund.

CREDITS AGAINST NET INCOME.

SEC. 214. In the case of a nonresident alien individual the personal exemption allowed by section 25(*c*) of this title shall be only $1,500. The credit for dependents allowed by section 25(*d*) shall not be allowed in the case of a nonresident alien individual unless he is a resident of a contiguous country. These credits shall be determined by the status of the taxpayer on the last day of the taxable year, except that in case of death the rule provided in section 25(*e*)(3) shall be applied.

ALLOWANCE OF DEDUCTIONS AND CREDITS.

SEC. 215. (*a*) **Return to Contain Information.**—A nonresident alien individual shall receive the benefit of the deductions and credits allowed to him in this title only by filing or causing to be filed with the collector a true and accurate return of his total income received from all sources in the United States, in the manner prescribed in this title; including therein all the information which the Commissioner may deem necessary for the calculation of such deductions and credits.

(*b*) **Tax Withheld at Source.**—The benefit of the personal exemption and credit for dependents, and of the reduced rate of tax provided for in section 211(*b*), may, in the discretion of the Commissioner and under regulations prescribed by him with the approval of the Secretary, be received by a nonresident alien individual entitled thereto, by filing a claim therefor with the withholding agent.

CREDITS AGAINST TAX.

SEC. 216. A nonresident alien individual shall not be allowed the credits against the tax for taxes of foreign countries and possessions of the United States allowed by section 131.

RETURNS.

SEC. 217. In the case of a nonresident alien individual the return, in lieu of the time prescribed in section 53(*a*)(1), shall be made on or before the fifteenth day of the sixth month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then on or before the fifteenth day of June.

PAYMENT OF TAX.

SEC. 218. (*a*) **Time of Payment.**—In the case of a nonresident alien individual the total amount of tax imposed by this title shall be paid, in lieu of the time prescribed in section 56(*a*), on the fifteenth day of June following

the close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on the fifteenth day of the sixth month following the close of the fiscal year.

SUPPLEMENT L

ASSESSMENT AND COLLECTION OF DEFICIENCIES.

DEFINITION OF DEFICIENCY.

SEC. 271. As used in this title in respect of a tax imposed by this title "deficiency" means—

(*a*) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(*b*) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

PROCEDURE IN GENERAL.

SEC. 272. (*a*) **Petition to Board of Tax Appeals.**—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

For exceptions to the restrictions imposed by this subsection, see—

(1) Subsection (*d*) of this section, relating to waivers by the taxpayer;

(2) Subsection (*f*) of this section relating, to notifications of mathematical errors appearing upon the face of the return;

(3) Section 273, relating to jeopardy assessments;

(4) Section 274, relating to bankruptcy and receiverships; and

(5) Section 1001 of the Revenue Act of 1926, as amended, relating to assessment or collection of the amount of the deficiency determined by the Board pending court review.

(*b*) **Collection of Deficiency Found by Board.**—If the taxpayer files a petition with the Board, the entire amount redetermined as that deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

(*c*) **Failure to File Petition.**—If the taxpayer does not file a petition with the Board within the time prescribed in subsection (*a*) of this section, the de-

ficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector.

(*d*) **Waiver of Restrictions.**—The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (*a*) of this section on the assessment and collection of the whole or any part of the deficiency.

(*e*) **Increase of Deficiency after Notice Mailed.**—The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed—if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

(*f*) **Further Deficiency Letters Restricted.**—If the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subsection (*a*) of this section, and the taxpayer files a petition with the Board within the time prescribed in such subsection, the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year, except in the case of fraud, and except as provided in subsection (*e*) of this section, relating to assertion of greater deficiencies before the Board, or in section 273(*c*), relating to the making of jeopardy assessments. If the taxpayer is notified that, on account of a mathematical error appearing upon the face of the return, an amount of tax in excess of that shown upon the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical error, such notice shall not be considered (for the purposes of this subsection, or of subsection (*a*) of this section, prohibiting assessment and collection until notice of deficiency has been mailed, or of section 322 (*c*), prohibiting credits or refunds after petition to the Board of Tax Appeals) as a notice of a deficiency, and the taxpayer shall have no right to file a petition with the Board based on such notice, nor shall such assessment or collection be prohibited by the provisions of subsection (*a*) of this section.

(*g*) **Jurisdiction Over Other Taxable Years.**—The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid.

(*h*) **Final Decisions of Board.**—For the purposes of this title the date on which a decision of the Board becomes final shall be determined according to the provisions of section 1005 of the Revenue Act of 1926.

(*i*) **Prorating of Deficiency to Installments.**—If the taxpayer has elected to pay the tax in installments and a deficiency has been assessed, the deficiency shall be prorated to the four installments. Except as provided in section 273 (relating to jeopardy assessments), that part of the deficiency so prorated to any installment the date for payment of which has not arrived, shall be collected at the same time as and as part of such installment. That part of the deficiency so prorated to any installment the date for payment of which has arrived, shall be paid upon notice and demand from the collector.

(*j*) **Extension of Time for Payment of Deficiencies.**—Where it is shown to the satisfaction of the Commissioner that the payment of a deficiency upon the date prescribed for the payment thereof will result in undue hardship to the taxpayer the Commissioner, with the approval of the Secretary (except where the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax), may grant an extension for the payment of such deficiency or any part thereof for a period not in excess of eighteen months, and, in exceptional cases, for a further period not in excess of twelve months. If an extension is granted, the Commissioner may require the taxpayer to furnish a bond in such amount, not exceeding double the amount of the deficiency, and with such sureties, as the Commissioner deems

necessary, conditioned upon the payment of the deficiency in accordance with the terms of the extension.

(*k*) **Address for Notice of Deficiency.**—In the absence of notice to the Commissioner under section 312(*a*) of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by this title, if mailed to the taxpayer at his last known address, shall be sufficient for the purposes of this title even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

SEC. 275. Except as provided in section 276—

(*a*) **General Rule.**—The amount of income taxes imposed by this title shall be assessed within two years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(*b*) **Request for Prompt Assessment.**—In the case of income received during the lifetime of a decedent, or by his estate during the period of administration, or by a corporation, the tax shall be assessed, and any proceeding in court without assessment for the collection of such tax shall be begun, within one year after written request therefor (filed after the return is made) by the executor, administrator, or other fiduciary representing the estate of such decedent, or by the corporation, but not after the expiration of two years after the return was filed. This subsection shall not apply in the case of a corporation unless—

(1) Such written request notifies the Commissioner that the corporation contemplates dissolution at or before the expiration of such year; and

(2) The dissolution is in good faith begun before the expiration of such year; and

(3) The dissolution is completed.

(*c*) **Corporation and Shareholder.**—If a corporation makes no return of the tax imposed by this title, but each of the shareholders includes in his return his distributive share of the net income of the corporation, then the tax of the corporation shall be assessed within four years after the last date on which any such shareholder's return was filed.

ADMISSIONS TAX.

SEC. 411. (*a*) The first two paragraphs of section 500 of the Revenue Act of 1926 are amended to read as follows:

"SEC. 500. (*a*) There shall be levied, assessed, collected, and paid

"(1) A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription, to be paid by the person paying for such admission; except that in case the amount paid for admission is $3 or less, no tax shall be imposed, and except that in case of admission to a prize fight, or boxing, sparring, or other pugilistic match or exhibition, for which the amount paid for admission is $5 or more, the tax shall be 25 per centum of such amount: *Provided*, That an equivalent tax shall be collected on all free or complimentary tickets or admissions to such prize fight, or boxing, sparring, or other pugilistic match or exhibition and the tax shall be on the amount for which a similar seat or box is sold at the said match or exhibition. Amounts paid for admission by season ticket or subscription shall be exempt only if the amount which would be charged to the holder or subscriber for a single admission is $3 or less;".

(*b*) Subsection (*a*) of this section shall take effect on the expiration of thirty days after the enactment of this Act.

TAX ON SALE OF TICKETS BY BROKERS.

SEC. 412. (*a*) Paragraph (2) of subdivision (*a*) of section 500 of the Revenue Act of 1926 is amended to read as follows:

"(2) Upon tickets or cards of admission to theaters, operas, and other places of amusement, sold at news stands, hotels, and places other than the ticket offices of such theaters, operas, or other places of amusement, at not to exceed 75 cents in excess of the sum of the established price therefor at such ticket offices plus the amount of any tax imposed under paragraph (1), a tax equivalent to 5 per centum of the amount of such excess; and if sold for more than 75 cents in excess of the sum of such established price plus the amount of any tax imposed under paragraph (1), a tax equivalent to 50 per centum of the whole amount of such excess, such taxes to be returned and paid, in the manner and subject to the interest provided in section 502, by the person selling such tickets;"

(*b*) Subsection (*a*) of this section shall take effect on the expiration of thirty days after the enactment of this Act.

CLUB DUES TAX.

SEC. 413. (*a*) Section 501 of the Revenue Act of 1926 is amended to read as follows:

"SEC. 501. (*a*) There shall be levied, assessed, collected, and paid a tax equivalent to 10 per centum of any amount paid—

"(1) As dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $25 per year; or

"(2) As initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of $25 per year.

"(*b*) Such taxes shall be paid by the person paying such dues or fees.

"(*c*) There shall be exempted from the provisions of this section all amounts paid as dues or fees to a fraternal society, order, or association, operating under the lodge system, or to any local fraternal organization among the students of a college or university. In the case of life memberships a life member shall pay annually, at the time for the payment of dues by active resident annual members, a tax equivalent to the tax upon the amount paid by such a member for dues or membership fees other than assessments, but shall pay no tax upon the amount paid for life membership.

"(*d*) As used in this section, the term 'dues' includes any assessment irrespective of the purpose for which made; and the term 'initiation fees,' includes any payment, contribution, or loan required as a condition precedent to membership, whether or not any such payment, contribution, or loan is evidenced by a certificate of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed, or loaned."

(*b*) Subsection (*a*) of this section shall take effect on the expiration of thirty days after the enactment of this Act.

Other Provisions.

In order to prevent the necessity of recurring again to the subject of taxation it seems desirable to bring together in this connection all the remaining provisions of the Constitution on this subject, though they are differently arranged in that instrument. And it might be here remarked that it is impracticable for the purposes of this discussion to dilate at length upon the separate provisions of the Constitution, our object being to elaborate merely upon the more important provisions.

The Constitution provides that "No tax or duty shall be laid on articles exported from any state." No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear or pay duties in another.

The object of these provisions is to prevent any possibility of applying the power to lay taxes or regulate commerce injuriously to the interests of any one state so as to favor or aid another. If Congress were allowed to lay a duty on exports from any one state it might unreasonably injure or even destroy the staple productions or common articles of that state. The inequality of such a tax would be extreme. In some of the states the whole of their means result from agricultural exports. In others a great proportion is derived from other sources. The power to intermeddle with the subject of exports is wholly taken away. On the other hand, preferences might be given to the ports of one state by regulations either of commerce or revenue which might confer on them local facilities or privileges in regard to commerce or revenue. And such preferences might be equally fatal if indirectly given under the milder form of requiring an entry, clearance or payment of duties in the ports of any state other than the ports of the state to or from which the vessel was bound. The last clause, therefore, does not prohibit Congress from requiring an entry or clearance or payment of duties at the custom house on importations in any port of a state to or from which the vessel is bound, but it cuts off the right to require such acts to be done in other states to which the vessel is not bound.

Restraints.

The succeeding clause of the Constitution contains a prohibition on the states for the like objects and purposes. "No state shall, without the consent of Congress, lay any imposts or duties on imports or exports except what may be absolutely

necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports and exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of Congress. No state shall without the consent of Congress levy any tonnage duty." If there is wisdom and sound policy in restraining the United States from exercising the power of taxation unequally in the states, there is at least equal wisdom and policy in restraining the states themselves from the exercise of the same power injuriously to the interests of each other. The power to enforce their inspection laws is still retained by the states, subject to the revision and control of Congress, so that sufficient provision is made for the convenient arrangement of their domestic and internal trade, whenever it is not injurious to the general interests.

Power to Regulate Commerce.

Of equal importance to the power of taxation is the power vested in Congress to regulate commerce with foreign nations, and among the several states and with the Indian tribes. This is perhaps the most elastic clause in the whole Constitution. The only commerce the framers of the Constitution knew was the foreign and coastwise commerce that was carried in ships. They little thought that the time would ever come when the commerce so carried would be far exceeded in amount and in value by the internal commerce of the country, yet that time has come. In the years that have passed since the adoption of the Constitution the country has made great strides and has increased from less than three million to more than one hundred million people. Discoveries in science and inventions in the arts have developed new subjects of trade and have created new agencies of commerce. Sailing vessels have given way to steamships, and railways have superseded turnpike roads, Conestoga wagons and canals for the transportation of passengers and freight. Telegraphs and telephones have annihilated distance, and in view of these great changes in conditions it is more than ever important that the constitutional limits upon the regulation of commerce should be clearly comprehended, and that the line which separates the provinces of federal and of state authority over this subject of national interest should be so far as possible accurately defined.

The want of the power to regulate commerce was one of the leading defects of the confederation, and probably, as much as any one cause, conduced to the establishment of the Constitution.

The term "commerce" as defined by Chief Justice Marshall

means not only traffic, but also commercial intercourse in all its branches, including transportation by sea and on land, importation and exportation and all that is necessarily incident thereto. The power conferred is to regulate or prescribe the rule by which commerce is to be governed. Commerce undoubtedly is traffic; but it is also something more. It is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches. Commerce includes navigation. The power over navigation was one of the primary objects for which the people of America adopted their government.

It should be borne in mind, however, that everything that is connected with commerce is not necessarily commerce. Bills of exchange may be given in payment for goods to be imported and yet such bills are mere personal obligations and are not in themselves subjects of commerce. It has also been held that money assessed for state taxation is not by a subsequent investment in a subject of commerce relieved from such taxation. So also a contract of insurance is not "an instrumentality of commerce," but a mere incident of commercial intercourse. A state may, therefore, prohibit foreign insurance companies and their agents from effecting within its territory contracts of insurance, save upon such conditions as the state may prescribe, but a state cannot prohibit its citizens from effecting in another state a contract of insurance. Insurance, commercial paper and trademarks are certainly as nearly related to and as truly incidents of commerce as a telegraphic inquiry as to the state of the market, or a telegraphic order for the forwarding of goods, though, unlike the bill of lading, they do not represent the goods. Lottery tickets are subjects of traffic and the carriage of such tickets by independent carriers from one state to another is interstate commerce. The supreme court has also ruled that the transfer of shares of railway companies is interstate commerce when such shares are transferred for the purpose of vesting in a holding company a majority of the shares of two competing railways engaged in interstate traffic.

In regard to commerce with foreign nations, it is universally admitted that the words comprehend every species of commercial intercourse. No sort of trade or intercourse can be carried on between this country and another to which it does not extend. This phase of commerce comes more properly under international law, and we will therefore confine our inquiry to commerce among the states. A very material object of this power is the relief of the states which import and export through other states from the levy of improper contributions on them by the latter.

If each state were at liberty to regulate the trade between state and state it is easy to foresee that ways would be found out to load the articles of import and export during their passage through the jurisdiction with duties which should fall on the makers of the latter and the consumers of the former.

It was pointed out previously that the power of Congress to regulate commerce is exclusive, at least in all cases where the subjects over which it is exercised are, in their nature, national or admit of one uniform system or plan of regulation. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.

Over the internal commerce of a state Congress has no power of regulation, nor any direct control. This power belongs exclusively to the states. In view of this fact the United States cannot license the sale of liquor in violation of the laws of any state.

Navigable Waters.

The question has been frequently raised: How far any state possesses the power to authorize an obstruction of any navigable stream or creek in which the tide ebbs and flows, within its territorial limits, as by authorizing the erection of a dam across it? The Supreme Court of the United States has decided that the power of Congress to regulate commerce included the power to determine what should or should not be deemed, in judgment of law, an obstruction to navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation and subject to all the requisite legislation by Congress.

A state may, however, rightfully regulate the exercise of the right of fishing in its navigable waters, and enforce by judicial proceedings a forfeiture of vessels whose navigators fail to conform to the regulations so prescribed, and a license to navigate granted by the United States confers no immunity from the operation of such regulations. The power granted to the United States of jurisdiction in admiralty does not carry with it a cession of navigable waters, or of general jurisdiction over them. Consequently a murder committed on a vessel of the navy of the United States while at anchor in navigable waters within the jurisdiction of a state does not come within the jurisdiction of a United States court.

The ferries across a river within the limits of one state are not within the power of Congress over commerce, and consequently the acts requiring boats engaged in the coasting trade to be registered and licensed do not apply thereto. A tax on railroad companies for every passenger carried out of the state by them is not void as a regulation of commerce in the absence of any conflicting regulation by Congress.

A review of the cases will show that of late the supreme court has recognized a clear distinction between those cases in which state regulations are admissible and those in which they are not, which, in view of its importance, it is well to state in the language of the supreme court: "Whatever subjects of the power over commerce are in their character national, or admit of one uniform system or plan of regulation, are to be regarded as within the exclusive control of Congress, but other subjects, which are to be regulated in view of local circumstances and facts, and which can usually be best regulated by state legislation, are, until Congress acts in the matter, subject to such legislation."

Tariffs.

The question arises whether Congress has the constitutional authority to apply the power to regulate commerce for the purpose of encouraging and protecting domestic manufactures. It is not denied that Congress may, incidentally, in its arrangements for revenue, or to countervail foreign restrictions, encourage the growth of domestic manufactures. It is insisted, however, that under the color of regulating commerce Congress has no right permanently to prohibit any importations, or to tax any unreasonably for the purpose of securing the home market to the domestic manufacturer, as they thereby destroy the commerce entrusted to them to regulate, and foster an interest with which they have no constitutional power to interfere. This opinion constitutes the leading doctrine of several of the Southern states. On the other hand, it is as earnestly maintained that Congress does possess the constitutional power to encourage and protect manufactures by appropriate regulations of commerce. It, therefore, becomes indispensable to review the grounds upon which the doctrine of each dominant party is maintained and to sift them to the bottom, since it cannot be disguised that the controversy over the tariff agitates the whole country and marks the divisions of party by the strongest lines, geographical and political.

The reasoning by which the doctrine is maintained, that the power to regulate commerce cannot be constitutionally applied as a means directly to encourage domestic manufactures, is to the following effect: The Constitution is one of limited and enumerated powers; and none of them can be rightfully exercised beyond the scope of the objects specified in those powers. It is not disputed that when the power is given all the appropriate means to carry it into effect are included. Neither is it disputed that the laying of duties on imported goods is nor may be an appropriate means of regulating commerce. But the question is a very different one whether, under pretense of an exercise of the power to regulate commerce, Congress may in fact impose duties for objects wholly distinct from commerce. The question comes to this—whether a power exclusively for the regulation of commerce is a power for the regulation of manufacture? The statement of such a question would seem to involve its own answer. Can a power granted for one purpose be transferred to another? If it can, where is the limitation in the Constitution? Are not commerce and manufactures as distinct as commerce and agriculture? If they are, how can a power to regulate one arise from a power to regulate the other? It is true that commerce and manufactures may be intimately connected with each other. A regulation of one may injuriously or beneficially affect the other. But that is not the point in controversy. It is whether Congress has a right to regulate that which is not committed to it, under a power which is committed to it, simply because there may be an intimate connection between the powers. If this were admitted, the enumeration of the powers of Congress in the Constitution would be wholly unnecessary. The wages of labor, the profits of stock, the rents of land and the performance of contracts would all be within the scope of the power to regulate commerce, for all bear an intimate relation to commerce. When duties are laid on certain classes of imported goods, not for purposes of revenue, but of retaliation and restriction to countervail foreign restrictions, they are strictly within the scope of the power, as a regulation of commerce. But when laid to encourage manufactures they have nothing to do with it. The power to regulate manufactures is no more confided to Congress than the power to interfere with the systems of education, the poor laws or the road laws of the state.

Having given in substance of the argument of those who deny the constitutional right of Congress to impose tariffs on imported goods for the purpose of protecting home industries, we will turn briefly to the argument of those upholding this right,

which is to the following effect: The power to regulate commerce being in its terms unlimited, includes all means appropriate to the end, and all means that have been usually exerted under the power. No one can doubt or deny that a power to regulate trade involves a power to tax it. The American colonies wholly denied the authority of the British Parliament to tax them, except as a regulation of commerce, but they admitted this exercise of power as legitimate and unquestionable. The distinction was with difficulty maintained in practice between laws for the regulation of commerce by way of taxation and laws which were made for mere monopoly or restriction, when they incidentally produced revenue. And it is certain that the main object of parliamentary regulations of trade with the colonies was the encouragement of manufactures in Great Britain. In commercial and manufacturing nations the power to regulate commerce has embraced practically the encouragement of manufactures. When the Constitution was framed, no one ever imagined that the power of protection of manufactures was to be taken away from all the states, and yet not delegated to the Union. The terms of the Constitution it is thought are sufficiently large to embrace the power; the practice of other nations and especially of Great Britain and the American colonies, has been to use it in this manner; and this exercise of it was one of the very grounds upon which the establishment of the Constitution was urged and vindicated. If Congress does not possess the power to encourage domestic manufactures by regulations of commerce, the power is annihilated for the whole nation. Here, then, is a case of laying duties, an ordinary means used in executing the power to regulate commerce; how can it be deemed unconstitutional? If it be said that the motive is not to collect revenue, what has that to do with the power? In other words, when an act is constitutional as an exercise of a power, can it be unconstitutional from the motives with which it is passed? If it can, then the constitutionality of an act must depend not upon the power, but upon the motives of the legislature, and it would hence follow, as a consequence, that the same act passed by one legislature will be constitutional and by another unconstitutional. The constitutionality of an act would thus depend upon processes utterly vague and incomprehensible. The manner of applying a power may be an abuse of it, but this does not prove that it is unconstitutional. At any rate, the above sets forth the arguments of both dominant parties upon the constitutionality of acts of Congress imposing tariff duties on imported goods.

Section 9 of Article I of the Constitution expressly forbids

Congress to tax exports; but this prohibition applies to foreign and does not apply to interstate commerce, nor to goods imported from the United States into Porto Rico. Internal revenue stamps required to be placed by the manufacturer upon articles for exportation do not fall within the prohibition.

The Constitution forbids the states to impose any duty on tonnage (Section 10 of Article I). The word "tonnage" as applied to American shipping means their entire internal capacity, expressed in tons of 100 cubical feet each, as estimated and ascertained by those rules of computation which are prescribed by acts of Congress. Port dues being charges imposed on vessels as instruments of commerce and payable by all vessels entering, remaining in or leaving a port are regulations of commerce and as such cannot be imposed by state authority. A state may regulate pilotage in the absence of legislation by Congress. Goods shipped in one state destined to points in another state are subject to regulation by Congress, whether or not such goods ever in reality leave the borders of the state of shipment. As soon as goods are placed in transit which are destined to points in another state, they become interstate commerce and subject to regulation by Congress.

The United States may in the discretion of Congress authorize or prohibit improvements in the waterways used in foreign or domestic commerce. It may change the established channels of rivers and dredge harbors, and the action of Congress is exclusive of any right to the contrary asserted under state authority.

A state may tax goods brought in from another state, though in the hands of the consignee and in the original packages, but a state cannot by taxation discriminate against either the natural products of or the goods manufactured in other states, whether by requiring of every non-resident trader as a prerequisite to his sales of other than agricultural products of or articles manufactured in the state a higher license fee than is required of traders in domestic goods. A state which taxes the traffic in any intoxicating liquors at any place other than the place of manufacture does not impose a discriminating tax upon a dealer in liquors manufactured in another state. Upon the same principle it has been held that a state may prohibit the sale of oleomargarine in imitation of butter, and that the act of Congress, of August 2, 1886, defining butter and imposing a tax upon oleomargarine does not authorize transportation and sale in violation of such a statute. It has likewise been held that a state may prohibit the sale of cigarettes brought in

from another state, when the size of the original package is such as to indicate an intention to sell at retail that which the state in its exercise of the police power has forbidden to be sold.

The construction of railway systems has required the courts to consider in many cases the respective powers of the United States and of the states in regard to transportation. Under the later cases a state may, in the exercise of its police power, regulate transportation so far as may be necessary for the protection, safety and comfort of its citizens, but it cannot by such regulations unnecessarily impede or obstruct interstate commerce, the power to regulate which is vested in Congress by the clause under consideration.

A state may fix and enforce maximum rates of fare and freight for interstate transportation on all railways within the state, even though the people in other states may be indirectly affected thereby. A state may appoint a commission to revise railway tariffs, but same must not interfere with interstate commerce. A state may also prohibit the running of freight trains on Sunday on any railway within the state. A state may authorize its railways commission to require a railway to erect and maintain stations at designated points. These rights are based on the ground that it is proper for a state in the exercise of its police power to make such regulations as are of a purely local nature and appertain to the internal welfare of the state, the restriction being that such laws enacted by a state must not assume to interfere with interstate commerce. Otherwise one state could legislate injuriously to another, to prevent which the power over interstate commerce is vested exclusively in Congress.

The anti-trust laws passed by Congress by virtue of the power to regulate commerce, which are of such vital importance at the present time, will be next discussed.

"Trusts."

In view of the growing sentiment in favor of the proper regulation of trusts and monopolies by the government, let us inquire into the constitutional right of Congress to legislate with this end in view.

A Trust has been defined as "a combination of corporations and properties made, in some cases, by the merger and consolidation of existing associations and in other cases by the organization of corporations to acquire and to hold the properties to be consolidated, or the controlling interest in the shares of the corporations to be combined." In other words, "Trusts" may

be regarded as combinations of individuals or corporations formed to obtain capital by the sale of stocks and bonds, to save the waste of competition, to secure in production, transportation and distribution the maximum of efficiency at the minimum of cost; to expand trade by reducing the price to the consumer, and by economical operation to increase the net profit to the producer.

There are four classes of people to be considered in any legislative regulation of Trusts by the United States. First—the investors in the bonds and shares issued by the so-called Trust. Second—the business rivals or competitors of such Trusts. Complaint is made on their behalf that the Trusts in order to destroy competition discriminate in their prices. Third—the consumers of the goods manufactured or sold by the corporations or Trusts. So far as this class is concerned, it is clear that no act of legislation can effectively prescribe the price at which the products of the corporation are to be sold, for the simple reason that market prices have always been and always will be regulated by the operation of the law of supply and demand. It is a well-recognized truth that successful commerce buys in the dearest markets. The fourth class to be considered in regulating Trusts are those who or whose goods are carried by common carriers.

It is contended that Trusts have a tendency to monoply. But intelligent managers of a successful business do not advance prices to the point at which destructive competition will be invited. When, by reason of an apparent permanence of demand and a present inadequacy of the means of supply, prices rise to a level that gives a reasonable assurance of profit to producers, the surplus capital of the world can always be relied on to augment the means of supply.

Legislation enacted for the purpose of regulating trade is of ancient origin. In the Middle Ages the theory prevailed that it was the duty of the government to fix the hours of labor, rates of wages, time and places of sale, etc. The policy of England directed to the restraint of colonial trade caused the Revolutionary War, after which there was a natural jealousy of governmental power and a determination to guard individual liberty against oppression. Consequently, when the Constitution of the United States was framed a government was founded not only upon the supremacy of the Federal Government in the exercise of the powers granted to it, but likewise upon the independence of the states and the freedom of the citizen.

It is to the states, and not to the United States, that we ought to look for the legislative and administrative regulation of the industrial organizations of the present and the future, which power of the state is ample. It is well known that a state may create corporations, with or without conditions, and it may authorize a corporation to do any business which an individual may lawfully do, and it may furthermore forbid a foreign corporation to do business within its territory. The United States cannot even grant a charter of incorporation, except as a means incidental to the exercise by the United States of a power of government. The United States assumes to control the operations of a corporation chartered by a state only under the power of regulating foreign and interstate commerce. But, as has been forcibly stated by our courts, the scope of the commerce clause of the Constitution cannot be enlarged because of present views of public interest. Any legislation which conflicts with the American doctrine that all men are equal before the law, and that equality of rights implies equality of obligations, and that subject rights of property and freedom of contract to administrative control is dangerous in a republic governed by universal suffrage.

Anti-Trust Legislation.

The first "anti-trust act" passed by Congress was drafted by the late Senator Hoar, of Massachusetts, and was passed because of public clamor as to "the grave evil of the accumulation in this country of vast fortunes in single hands or of vast properties in the hands of great corporations."

The act of July 2, 1890, declares illegal every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or territories, or with foreign nations; and every monopoly or attempt to monopolize any part of such trade or commerce subjects to forfeiture, seizure and condemnation any property owned under any contract, or by any combination, or person, pursuant to any conspiracy. This act also gives a right of action for injury to business or property by reason of anything declared unlawful by the act, with threefold damages, costs of suit and attorney's fee, and further requires the several district attorneys, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

Under the terms of the act of February 14, 1903, the Bureau of Corporations in the Department of Commerce and Labor was created. This act authorizes the commissioner of this

bureau to make, under the direction and control of the Secretary of Commerce and Labor, "diligent investigation into the organization, conduct and management of the business of any corporation, joint-stock company, or corporate combination engaged in commerce among the several states and with foreign nations, excepting common carriers subject to the Interstate Commerce act, and to gather such information and data as will enable the President of the United States to make recommendations to Congress for legislation for the regulation of such commerce, and to report such data to the President from time to time as he shall require; and the information so obtained, or as much thereof as the President shall direct, shall be made public." Congress further made it the duty of this bureau to gather, compile, publish and supply useful information concerning corporations doing business within the limits of the United States as shall engage in interstate commerce, or in commerce between the United States and any foreign country, including corporations engaged in insurance, and to attend to such other duties as may be hereafter provided by law.

The term "contracts in restraint of trade" in the act making same unlawful includes without regard to their reasonableness or unreasonableness all kinds of those contracts which, in fact, restrain or may restrain trade. Under the conditions of trade in the time of the old year books any restraint of trade was an unlawful restraint, but under modern conditions the test of invalidity is the unreasonableness of the restraint, for an agreement would not necessarily be in restraint of trade, although its direct effect might be to restrain to some extent the trade which had been done.

Labor Unions.

A combination of labor (labor unions) is from a logical standpoint as clearly subject to the statute as any combination of capital. The labor unions reasonably restrain trade when they combine to sell a certain minimum of labor for not less than a certain price, but they unreasonably restrain trade when, in order to effect their purpose, they use threats and force to prevent employers from securing labor not provided by members of the union. The courts have taken the view that in the absence of an express and unfulfilled contract of service, it is the legal right of every man to refuse to work, but it is neither the legal nor the moral right of any man to hinder other men from working.

The act of July 2, 1890, popularly known as the Sherman

Anti-Trust law, has been construed to forbid an agreement by several corporations organized under the laws of different states and engaged in the manufacture, interstate transportation and sale of a commodity, to abstain from competition as between themselves within a designated territory, including more than one state. In the famous Northern Securities Company case, it was held to forbid a combination by several persons whereby a holding corporation is organized under the laws of a state to acquire and hold the majorities of the shares of two railways organized under the laws of other states and theretofore competing in interstate traffic. This important statute is to be construed, in its application, according to the "rules of reason;" the combination in restraint of trade, in order to come within the inhibition of the act, must be unreasonable.

In view of their importance, especial stress has been laid upon the power of Congress to impose taxes and to regulate commerce. Various other powers are vested in the legislative branch of our government, concerning which it is important to briefly comment.

The next clause of Article I, Section 8, of the Constitution of the United States vests in Congress the power to establish a uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States. It is of the deepest interest to the whole Union to know who are entitled to enjoy the rights of citizens in each state, since they thereby, in effect, become entitled to the rights of citizens in all the states. It follows from the very nature of the power that to be useful it must be exclusive. It has been held that a naturalization law which by its terms is made applicable alike to all the states, without distinction or discrimination, is not unconstitutional merely because its operations may be wholly different in one state from another.

Bankruptcy Laws.

As stated in The Federalist, "the power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce and will prevent so many frauds, where the parties or their property may lie or be removed into different states, that the expediency of it seems not likely to be drawn in question." One of the first duties of legislation, while it provides amply for the sacred obligation of contracts and the remedies to enforce them, is to relieve the unfortunate and meritorious debtor from a slavery of mind and body which cuts him off from a fair enjoyment of the common benefits of society,

and robs his family of the fruits of his labor and the benefits of his paternal superintendence. A national government which did not possess this power of legislation would be little worthy of the exalted functions of guarding the happiness and supporting the rights of a free people. The law at present in force upon the subject of bankruptcy is the act of July 28, 1898, and supplements, which has heretofore been considered. It should be borne in mind that the states have authority to pass bankrupt laws provided they do not impair the obligation of contracts, and provided there be no act of Congress in force to establish a uniform system of bankruptcy conflicting with such laws. But an act of a state legislature which discharges a debtor from all liability for debts contracted previously to his discharge, on his surrendering his property for the benefit of his creditors, is invalid, so far as it attempts to discharge the contract.

The next clause of the Constitution vests in Congress the power "to coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures," anent which a few remarks may profitably be made.

The grounds upon which the general power to coin money and regulate the value of foreign and domestic coin is granted to the National Government cannot require much illustration in order to vindicate it. Money is the universal medium or common standard by a comparison with which the value of all merchandise may be ascertained and the power to coin it is one of the ordinary prerogatives of sovereignty.

The Legal Tender Acts.

After the breaking out of the Civil War in 1861, it was deemed necessary by Congress, in order to supply the means of carrying on the war, to issue a large amount of treasury notes, and to make them a legal tender in payment of private debts, and also of all public dues except duties on imports and interest on the public debt. These notes thereupon to a large extent became the circulating medium of the country, and gold and silver ceased to be used in ordinary traffic except on the Pacific slope. The constitutional validity of the Legal Tender acts of Congress was strongly contested, especially in their application to pre-existing debts, but it was generally sustained by the state courts. The question did not come before the Supreme Court of the United States for decision until the case of Hepburn *vs.* Griswold, decided in December, 1869. In that case a majority of the court held that the acts were valid so far as they applied to debts contracted subsequently to their passage, but that they

were, as to debts contracted before their passage, unwarranted by the Constitution. A year later, however, this decision was overruled, and the acts were sustained, as well as to their application to pre-existing debts as to those subsequently contracted. In the Legal Tender cases the power of Congress to make paper money a legal tender for times of peace as well as war was upheld.

The powers vested in Congress by the succeeding clauses of Article I, Section 8, of the Federal Constitution are well understood and require but passing comment. Besides those specifically mentioned, Congress is empowered "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department, or officer thereof." This does not mean absolutely necessary, nor does it imply the use of only the most direct and simple means calculated to produce the end. But it requires that the means used in the exercise of an expressed power should be appropriate to the end. Therefore, Congress has power to charter the Bank of the United States, as a necessary and useful instrument of the fiscal operations of the government. So also it has power under this general authority to provide for the punishment of any offenses which interfere with, obstruct or prevent commerce and navigation with foreign states, and among the several states, although such offenses may be done on land. Few powers of the government were at the time of the adoption of the Constitution assailed with more severe invective and more declamatory intemperance than the power under discussion. It cannot be denied that the powers given by the Constitution imply the ordinary means of execution, for without the substance of the power the Constitution would be a dead letter. However, this power was inserted as a precaution and to emphasize the fact that Congress shall have all the incidental and instrumental powers necessary and proper to carry into execution all the expressed powers. Upon the whole, as stated by Chief Justice Story, "The result of the most careful examination of this clause is that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the National Government."

Another question which has for a long time agitated the public councils of the nation, is as to the authority of Congress to make roads, canals and other internal improvements. Con-

cerning the right to appropriate money to internal improvements, the subject has already been reviewed in considering the power to lay and collect taxes. The only limitation is that prescribed by the terms of the Constitution—to wit, that the objects shall be the common defense or the general welfare of the Union. The true test is whether the object be of a local character and local use, in which case Congress cannot constitutionally appropriate money for the object, or whether it be of general benefit to the states, in which event it matters not whether the improvement be in one state in point of locality or in several. In fact, Congress may directly undertake and carry on a system of internal improvements for the general welfare, whenever such improvements fall within the scope of any of the enumerated powers. Thus, Congress may authorize the construction of lighthouses, piers, buoys and beacons for the purposes of navigation. As incidental to the power to lay and collect taxes, Congress may authorize the purchase and building of custom houses, revenue cutters and public warehouses. As incidental to the power to make war, Congress may erect forts, arsenals, dock yards, navy yards and magazines.

A very practical question has been raised: How far Congress can make a law giving the United States a preference and priority of payment of their debts, in cases of the death, insolvency or bankruptcy of their debtors, out of their estates. The supreme court has decided upon deliberate argument that Congress possessed such a constitutional power. It is a necessary and proper power to carry into effect the other powers of the government. In the language of the court, "The government is to pay the debts of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object. It may purchase and remit bills for this object, and pass all laws to render effectual the collection of its debts."

It is under the same implied authority that the United States have any right even to sue in their own courts, for an express power is nowhere given in the Constitution. Congress may not only authorize suits to be brought in the name of the United States, but in the name of any artificial person, such as the Postmaster General. The right of making contracts and instituting suits is an incident to the general right of sovereignty. The United States, being a body politic, may within the sphere of the constitutional powers confided to them and through the instrumentality of the proper department to which those powers are confided enter into contracts not prohibited by law and appropriate money to the just exercise of those powers.

Section 9 of Article I affords an important protection to every citizen in the country, to wit, "The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." The President of the United States has no power to suspend the privilege of the writ of *habeas corpus* without an act of Congress to authorize it. The effect of a suspension of the privilege of this writ is to confer on the Executive the power immemorially exercised by the British Crown before the passage of the famous *habeas corpus* act—namely, the power to arrest by warrant for treason or suspicion of treason without specially expressing the nature of the treasonable acts charged, and to imprison the party so arrested on such warrant for an indefinite period without bail or trial. In the exercise of such a power there must be a warrant, and it must be for treasonable practices. The power of suspending the writ of *habeas corpus* is inconsistent with the existence of a free government and is against the spirit of the Constitution and of all the foundations upon which it is erected.

Ex Post Facto Laws.

A protection to individual liberty of equal importance to the foregoing is provided by the same section of Article I, Section 9, which declares that "no bill of attainder or *ex post facto* law shall be passed." *Ex post facto* laws are such as create or aggravate a crime or increase the punishment or change the rules of evidence for the purpose of conviction. The phrase only applies to penal and criminal laws, which inflict forfeitures of punishments, and not to civil proceedings which affect private rights retrospectively. It is a well-known principle of law that where no other time is fixed for the operation of a penal statute it takes effect from the time of its passage, and ignorance of the existence of such act forms no legal excuse for a violation of it. In other words, the Constitution aims to protect the individual from punishment for a crime committed before the passage of an act which theretofore was not provided against.

Prohibitions upon States.

Certain restrictions upon the authority of the states are specifically imposed by the tenth section of the first article, which we shall next proceed to investigate. Some of these, and especially those in regard to the power of taxation and the regulation of commerce, will be omitted here for the reason that they have been considered previously. The others will be examined briefly in the order of the text of the Constitution.

The first clause provides that "no state shall enter into any treaty, alliance or confederation; grant letters of marque or reprisal, coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts, pass any bill of attainder or *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility."

The only one of these restrictions requiring special comment is that regarding the impairment of the obligation of contracts, which concerns every business man. There is perhaps not a single clause of the Constitution which has given rise to more controversy than this clause. The provision has never been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. A private charter is such a contract. An appointment to a salaried office, however, is not a contract within the meaning of the Constitution. All contracts are subject to the rights of eminent domain existing in the several states, and the exercise of this power does not conflict with the Constitution. Nor does the exercise of the power of taxation. It has been held in construing this clause that its spirit is not violated by the passage by a state of Statutes of Limitation, exemption laws, insolvent laws discharging the person of a debtor from imprisonment, or recording acts postponing an elder to a younger title after a limited period. Whatever belongs merely to remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract; but if that effect be produced it is immaterial whether it be done by acting on the remedy or directly on the contract itself. The extent of the change is immaterial, any postponement or acceleration of the performance of the contract impairing its obligation.

This prohibition would, if strictly construed, include under the word "law" only statutes enacted by state legislatures, but it has been determined that the word "law" comprehends, in addition to acts of legislation, state constitutions and constitutional amendments, together with the judicial decisions of state courts of last resort, rendered subsequently to the making of the contract in question and antecedently to the suit in which the court determined the invalidity of the contract. To understand the meaning of this clause, we must have a clear conception of what is meant by the obligation of a contract. It seems agreed that when the obligation of contract is spoken of in the Constitution, we are to understand not the mere moral, but the legal obligation of contracts, and in this connection it is important

to distinguish between what is a mere breach of contract and what constitutes an impairment of the obligation thereof. The moral obligation of contracts is, so far as human society is concerned, of an imperfect kind, which the parties are left free to obey or not, as they please. No human lawgiver can either impair or reach it. The Constitution has not in contemplation any such obligations, but such only as might be impaired by a state. It is the civil obligation of contracts which this clause is designed to cover. The civil obligation of a contract may be defined as the duty of performance which the law imposes on one or other, or both, of the parties to the contract. In the language of Chief Justice Marshall, "Any law which releases a part of this obligation must in the literal sense of the word impair it."

A state cannot take away by statute all or a substantial part of the power for the enforcement of a contract. Consequently it cannot forbid its courts to entertain jurisdiction of a suit to enforce or obtain damages for the breach of a class of contracts legally valid when made. Nor can a state after the making of a contract change to the prejudice of either party the measure of damages for its breach.

It is unconstitutional for a state to materially increase the debtor's exemption after a judgment has been entered. Furthermore, a state cannot, after the making of a mortgage, enlarge the period of time allowed for the redemption after foreclosure, nor take away the right to compound interest, if given by the law existing at the time of the making of the contract.

Whether a state legislature has authority to pass a law declaring a marriage void, or to award divorce, has been made a question upon which the authorities are somewhat conflicting. Marriage, though it be a civil institution, is understood to constitute a solemn, obligatory contract between the parties, and it has been denied that a state legislature constitutionally possesses authority to dissolve that contract against the will and without the default of either party. Some courts have insisted that the granting of a divorce was a judicial power, and consequently could not be exercised by the legislature. The better authority, however, holds that marriage is a civil contract, and that the legislature of a state may regulate the remedy for this breach.

Contracts for the payment of money being within the protection of the constitutional prohibition of the impairment of their obligation, judgments upon such contracts are equally entitled to protection. Therefore, a judgment against a municipal corporation founded upon a breach of contract is not affected

by a subsequent legislative abolition of the municipality's power to levy taxes for the payment of its debts. But the rights of a judgment creditor are not impaired by a state statute reducing the rate of interest thereafter to accrue upon existing judgments; nor are judgments founded upon torts, contracts whose obligations will be protected against subsequent legislation.

In concluding our discussion of this clause, the force and effect of the prohibition as construed by the Supreme Court of the United States may be summarized as follows: A state may not by any law or by any act to which the state by its enforcement thereof gives the force of a law, deprive a party of the legal right of enforcing, or obtaining compensation for the breach of an express contract, executed or executory, between individuals, or between a state and individuals, but a state may regulate or limit the remedies of the contracting parties, provided that it leaves in force a substantial part of the legal remedies which subsisted at the time the contract was made.

It seems to be the general opinion that since the American Revolution no state government can be presumed to possess the transcendental sovereignty to take away vested rights of property. No government would be deemed to be free where the rights of property are left solely dependent upon a legislative body without any restraint. The rights of personal liberty and private property should be held sacred and a state legislature is forbidden by the Federal Constitution to violate or disregard them.

The Constitution of the United States was not framed to meet only the exigencies of the period of its formation, nor does it purport to be a code which with minute detail prescribes all that may be done, and all that may not be done by Congress in the execution of the powers specifically granted. As Daniel Webster said in one of his famous arguments, and as repeated by Chief Justice Marshall: "The Constitution enumerates but does not define the powers which it grants, nor does it prescribe the means which may rightfully be used in executing those powers and without whose use the grant of the powers would be nugatory."

Article I, Section 8, of the Constitution, declares that "the Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof." The question arises—How is it to be determined what laws are necessary and proper? If Congress can so determine, obviously every act of Congress must be regarded as constitu-

tional. If the final determination of this question is to be made by a court, what principles are to guide the judges in reaching a conclusion? The answer to this question, as found in the best authorities, is as follows: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to the end, which are not prohibited, but consistent with the letter and spirit of the Constitution are constitutional."

By virtue of the implied powers, it has been held that Congress may enact statutes creating banking corporations as fiscal aids to the government; regulating the carriage of the mails and determining what may be transported and what must be excluded from the mails; exercising the right of eminent domain with regard to land within the bounds of a state and held in private ownership; providing for the exclusion or expulsion of aliens from the limits of the United States. The Government of the United States is one of enumerated powers, the national Constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the National Government assumes to possess. In this respect it differs from the constitutions of the several states, which are not grants of powers to the States, but which apportion and impose restrictions upon the powers which the states inherently possess. It was no uncommon occurrence in early days for the individual states to claim the right to interpret the Federal Constitution for themselves individually, and in their aggregate capacity, independent of Federal authority. But it is now an established principle that in all cases involving a construction of the Federal Constitution, the courts of the United States have exclusive jurisdiction and their decisions are binding upon the state courts. The courts of the several states are as much bound to uphold the supremacy of the Federal Constitution as are the Federal courts.

Judicial Interpretation.

From force of circumstances and conditions necessarily arising in the administration of the affairs of the government, it is evident that those who are charged with official duties, whether executive, legislative or judicial, must necessarily construe the Constitution and laws in numerous instances. Every department of the government invested with constitutional powers must, in the first instance, be the judge of its powers or it could not act; and this practical construction by persons or departments outside of the judiciary may or may not be final,

according to the circumstances and nature of each particular case. That is to say, whenever a constitutional provision or statute gives a discretionary power to be exercised when and under such circumstances as those who are charged with exercising such power may deem expedient, the construction given to all such provisions or statutes by those charged with such duties is conclusive and not subject to review by the judicial power, even though erroneous.

Whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts.

As all constitutional questions cannot receive judicial interpretation, it follows that only in cases where some right, public or private, is involved, which results in litigation and is not included in that class of cases which are addressed to the discretion of the other departments, questions requiring construction of constitutional provisions, can be brought to the attention of the judiciary, and judicial construction of such provisions or statutes obtained in the course of judicial administration, and when this is done the law as declared in the judgment rendered must be taken as the authoritative rule within the jurisdiction in which it is announced, until reversed, overruled or changed by constitutional amendment or legislation.

In construing the Constitution the purpose is to give effect to the intent of the framers and of the people who have adopted it, and it is a rule of construction that the Constitution is to be construed so as to promote the objects for which it was framed and adopted; and to accomplish this result the extremes of both a liberal and a strict construction are to be avoided and technical rules are to be excluded.

Another well-recognized rule of construction is that in interpreting the Constitution, the whole instrument is to be examined with a view of ascertaining the meaning of each and every part. The presumption and legal intendment is that each and every clause in a written constitution has been inserted for some useful purpose, and, therefore, the instrument must be construed as a whole, in order that its intent and general purposes may be ascertained; and as a necessary result of this rule it follows that wherever it is possible to do so each provision must be construed so that it shall harmonize with all others, without distorting the meaning of any of such provisions, to the end that the intent of the framers may be ascertained and carried out and effect given to the instrument as a whole.

The Constitution has been construed to operate prospectively, unless from the language used or the objects to be accomplished it is clearly shown that some provision was intended to operate retrospectively. The construction given must always be uniform, so that the operation of the instrument will be inflexible, operating at all times alike and in the same manner with reference to the same subjects.

As it would not be practicable, even if possible, in a written constitution to specify in detail all of its objects and purposes or the means by which they are to be carried into effect, constitutional powers are often granted or restrained in general terms from which implied powers and restraints necessarily arise. It is an established rule of construction, very important to bear in mind, that where the Constitution confers a power or enjoins a duty, it also confers by implication all powers that are necessary for the exercise of the one or for the performance of the other.

The progress of our investigation into the Constitution of the United States has now directed us to an inquiry of the organization and powers of the Executive Department of the Government. The most difficult task of any government is to properly outline and limit the powers of the Executive.

Under the Confederation no National Executive was provided for. The whole powers of the National Government were vested in a Congress consisting of a single body, and that body was authorized to appoint a committee of the states, composed of one delegate from every state, to sit in the recess, and to delegate to them such of their own powers, not requiring the consent of nine states, as nine states should consent to. This want of a National Executive was deemed a fatal defect in the Confederation. It is admitted, as a fundamental maxim of government, that the legislative, executive and judicial departments ought to be separate, and the powers of one ought not to be exercised by either of the others. Where one is exercised by the other, a real despotism results.

The framers of the Federal Constitution, recognizing this fact, provided in Article II of the Constitution that "the executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows" (to be hereinafter considered). Many commentators have held the opinion that the executive power of a government should be vested in two or more persons rather than in a single individual. The history of ancient

nations, particularly that of Rome, points out the fact that many mischiefs arose from dissensions between the consuls, and between the military tribunes, who were at times substituted in their stead. It is obvious that a division of the executive power between two or more persons must always tend to produce dissensions. Whenever two or more persons are engaged in any common enterprise or pursuit there is always danger of difference of opinion. If it be a public trust or office in which they are clothed with equal dignity and authority, there are peculiar dangers arising from personal emulation or animosity; from superior talents on one side, encountering strong jealousies on the other; from pride of opinion on one side and weak devotion to popular prejudices on the other. From these causes the most bitter rivalries and dissensions will occur, which weaken the authority and distract the plans and operations of the executive department, even at the most critical moments. Furthermore, plurality in the executive diminishes the means as well as the power of fixing responsibility of bad measures upon the real authors. For these reasons it was decided to vest the executive power in a single individual, a President.

The Chief Executive.

It has been decided that an act done by one President, vesting a right in a citizen, is not subject to review or reversal by his successor. It has been held, however, that a conditional pardon, granted by one President, may be revoked by his successor, before delivery to the prisoner.

The next clause of Article II points out the manner in which the President is to be chosen. A review of our Presidential elections demonstrates the fact that the President is not, strictly speaking, elected by popular vote. In view of the frequent discussions upon this point, it will be well to inquire into the original scheme embodied in the Constitution, together with the amendment subsequently passed. The Constitution as originally adopted provides that "each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the state may be entitled in the Congress; but no Senator, or Representative, or person holding an office of trust or profit under the United States shall be appointed an elector.

"The electors shall meet in their respective states and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall

make a list of all persons voted for, and of the number of votes for each, which list they shall sign and certify and transmit sealed to the seat of Government of the United States, directed to the President of the Senate. The President of the Senate shall in the presence of the Senate and House of Representatives open all certificates and the votes shall then be counted. The person having the greatest number of votes shall be President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President."

The Electoral College.

The principal motive which induced a change of the choice of President from a national legislature (which was at first contemplated) was to have the sense of the people operate in the choice of the person to whom so important a trust was confided. This would be accomplished better, it was thought, by committing the right of choice to persons selected for that sole purpose, instead of persons selected for the general purposes of legislation. Hence an electoral college was provided for. The President thus chosen by this intermediate body is far more independent than if chosen by a legislative body, to whom he might be expected to make corresponding sacrifices to gratify their wishes or reward their services. It was further thought that, being chosen by the voice of the people, the Executive would turn his gratitude in the natural direction, and sedulously guard the people's rights.

The number of electors is equal to the number of Senators and Representatives of each state, thus giving to each state as virtual representation in the electoral colleges as that which it enjoys in Congress. The votes when given are to be transmitted

to the seat of the National Government, and there opened and counted in the presence of both Houses. The person who has the next highest number of votes after the choice of President is to be Vice-President. If none of the candidates for President has the required majority the House of Representatives, being the popular branch of the government, is to elect from the five highest on the list of the person whom they may deem best qualified for the office, each state being accorded one vote in the choice. In the event of a Vice-President not being chosen as provided for, the Senate is given the right to choose.

It may be observed that in no respect have the enlarged and liberal views of the framers of the Constitution, and the expectations of the public when it was adopted, been so completely frustrated as in the practical operation of the system. It is a notorious fact that the electors are now chosen wholly with reference to particular candidates, and are pledged to vote for them. The candidates for the Presidency are selected and announced in each state long before the election; and an enterprising canvass is maintained in the newspapers, and in party meetings, to secure votes for the favored candidate and to defeat his opponents. So that nothing is left to the electors after their choice but to register votes which are already pledged. As a matter of fact, the exercise of an independent judgment by an elector would be treated as a political usurpation, dishonorable to the individual and a fraud upon his constituents.

In the third Presidential election (in which Thomas Jefferson and Aaron Burr were candidates), the defect in the system above set forth was practically illustrated. Mr. Bayard, of Delaware, by his final vote in favor of Mr. Jefferson, decided the election. It was remarked at the time that in the election of Mr. Jefferson the votes of two or three states were held by persons who soon afterward received office from him. It cannot escape notice that if the House of Representatives is to choose a President the choice is apt to be influenced by many motives independent of his merits and qualifications.

As a result of the election in 1801, the Twelfth Amendment to the Constitution was passed in 1804, and, as this amendment materially changes the mode of electing a President in several respects, we will quote it in full:

The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom at least shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-

President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each; which lists they shall sign and certify, and transmit, sealed, to the seat of Government of the United States, directed to the President of the Senate; the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person has such majority, then, from the persons having the highest numbers, not exceeding three (note change from five as in original text), on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as the President, as in the case of the death or other constitutional disability of the President.

The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.

But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

The electors meet in their respective states on the first Wednesday in December following the election, and their returns must be transmitted to the seat of government before the first Wednesday in the following January. The certificates are opened and counted on the second Wednesday of the succeeding February.

The changes which this amendment effects should be carefully noted. In the first place, it provides that the ballots of the electors shall be separately given for President and Vice-Presi-

dent, instead of one ballot for two persons as President. By this amendment the Senate may proceed to a choice of the Vice-President immediately on ascertaining the returns of the votes. In the next place, under the original mode if no choice should be made of a President, by the House of Representatives until after the expiration of the term of the preceding officer, there would be no person to perform the functions of the office and interregnum would ensue, causing a total suspension of the powers of government. By virtue of the amendment quoted the new Vice-President would, in such case, act as President. There are several other minor changes, which, however, need not be commented upon here. It might be observed that this amendment has diminished the dignity and importance of the office of Vice-President. Originally he was a competitor for the Presidency. This is no longer the case.

Congress is given the power to determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States.

The elector is presumed to be entirely at liberty to act according to the dictates of his own judgment when the period arrives for casting his vote; but whatever may be the theory, the fact is otherwise in practice. In 1872 Horace Greeley, one of the candidates for the Presidency, died after the popular election and before the electoral college had convened. Under such circumstances, the electors chosen to vote for him were left at liberty to vote as they pleased, and as they did not constitute a majority, so as to make united action important, they scattered their votes according to personal preferences.

Qualifications.

It is well known that no other than a natural-born citizen who is at least thirty-five years old and who has been fourteen years a resident within the United States is eligible to become President. In case of the death, resignation or inability of the President to discharge the powers and duties of his office, the same shall devolve upon the Vice-President. This has occurred five times within the history of our country. In the event of the death, resignation or inability of the President, and Vice-President, Congress is given authority to declare who shall then act as President, and such officer shall then act accordingly until the disability be removed, or a President elected. The President before entering upon the duties of his office shall take the following oath: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United

States, and will, to the best of my ability, preserve, protect and defend the Constitution of the United States." This is a suitable pledge by the President of his fidelity and responsibility to his country, and creates upon his conscience a deep sense of duty, by an appeal, at once, in the presence of God and man, to the most sacred and solemn sanctions which can operate upon the human mind.

Having considered in whom the executive power is vested under the Constitution, together with the method of selection and his general qualifications, we will direct our attention to a brief inquiry into his general powers and duties, concluding which we will consider the judicial branch of the government.

The powers and duties vested in the Executive under the Constitution of the United States are set forth in the second and third sections of Article II thereof. The most obvious powers of an Executive are to execute the laws, maintain peace and resist foreign invasion. For these purposes it is provided that "the President shall be commander-in-chief of the army and navy of the United States and of the militia of the several states when called into the actual service of the United States." If a state of war exists, the President, as commander-in-chief, has the authority, without any act of Congress, to exercise all belligerent rights, such, for instance, as to institute a blockade. The President is not obliged to take personally the command of the militia when called into the service of the general government; but he may place them under the command of officers of the army of the United States, to whom, in his absence, he may delegate the powers vested in him by the Constitution. Any officer of the army may, therefore, be required by orders from the President to perform the appropriate duties of his station in the militia, when in the service of the United States, whenever the public interest shall so require. But this power must be exercised in strict accordance with the right of appointment of militia officers, which is expressly reserved to the states. The rules and orders made and issued by the Secretary of War and of the Navy are to be considered as emanating from the President. The President speaks and acts through the heads of departments in reference to the business committed to them. Congress may, however, impose independent duties upon the head of a department when not repugnant to any rights secured by the Constitution.

The President is further given the power to "require the opinion, in writing, of the principal officer in each of the executive departments, upon any subjects relating to the duties of

their respective offices." The custom was inaugurated in Washington's administration of holding a consultation with the heads of departments, either assembled, or by taking their opinions separately in conversation or in writing. Mr. Jefferson's practice of holding Cabinet meetings for the determination of all important questions of administration has been followed by the later Presidents; but there is no law requiring this, and each President will determine his own course. The Cabinet, as a body of councillors, has no necessary place in our constitutional system; the President and not the Cabinet, is responsible for all the measures of the Administration, and whatever is done by the head of a department is, in contemplation of law, done by the President through the proper executive agent. This system is directly opposite to that adopted in England. In Great Britain the Cabinet is responsible, for everything done by the King is supposed to be by their advice. In this country the Cabinet is not required to be in accord with Congress or with either House thereof, while in Great Britain they must be in harmony with the House of Commons on all important questions. In Great Britain the members of the Cabinet are entitled to sit in the legislative body, whereas in the United States Cabinet members enjoy no such privilege.

The President is further authorized to "grant reprieves and pardons for offenses against the United States, except in cases of impeachment." Many commentators contend that the power of pardon does not exist under a perfect administration of the laws and that the admission of the power is a tacit acknowledgment of the infirmity of the course of justice. But, as stated by the erudite Story, if this be a defect at all, it arises from the infirmity of human nature generally. No one will contend that any system of laws can provide for every possible shade of guilt a proportionate degree of punishment. The total exclusion of all power of pardon would necessarily introduce a very dangerous power in judges and juries in following the spirit rather than the letter of the laws. There are not only various gradations of guilt in the commission of the same crime, which are not susceptible of any previous enumeration and definition, but the proofs must in many cases be imperfect, particularly as to the aggravating or mitigating circumstances. The power of pardon is indispensable in order to correct evils and mistakes subsequently discovered. A sense of responsibility being strongest in proportion as it is undivided, the prerogative of pardon has consequently been vested exclusively in the Executive. The President, it has been held, may pardon as well before trial

and conviction as afterward. He may also pardon after the expiration of the imprisonment, which forms part of the sentence, and he may remit a fine after the death of the offender. He may grant a conditional pardon provided the condition be compatible with the genius of our Constitution and laws. Where the condition is such that the government has no power to carry it into effect, the pardon will be in effect unconditional. It should be borne in mind that a conditional pardon is not complete until delivery. It has likewise been held that the pardoning power includes that of remitting fines, penalties and forfeitures under the revenue laws; fines imposed on defaulting jurors and fines for contempt of court and in criminal cases in general. The President has no power, however, to remit the forfeiture of a bail bond. Nor can he, by a pardon, defeat a legal interest or right which has become vested in a private citizen, as, for example, the vested right of an officer making a seizure. The supreme court has decided that the effect of a pardon cannot be restricted by subsequent legislation. The grant of the pardoning power neither requires nor authorizes the President to re-examine the case upon new facts, nor to grant a pardon upon the assumption of the new facts alleged. A pardon is a private though official act and must be delivered to and accepted by the criminal. The President alone can pardon offenses committed in a territory, in violation of the acts of Congress.

A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is free, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense.

Treaty-Making Power.

The power to make treaties which is vested in the Executive by the following clause of Section 2 is a very important one and embraces all sorts of treaties, for peace or war, for commerce or territory, for indemnity for injuries or payment of debts, for the recognition and enforcement of principles of public law, and for any other purposes which the policy or interests of this country may dictate in its intercourse with other nations. Under the Confederation the treaty-making power was vested solely in Congress. Experience demonstrated the defects of this plan, and consequently the framers of the Constitution vested this power in the President. The qualification imposed upon the exercise of this power is that treaties be made

"by and with the advice and consent of the Senate," and it is further necessary that two-thirds of the Senators present concur. Considering the delicacy and extent of the power, it is too much to expect that a free people would confide to a single magistrate, however respectable, the sole authority to act conclusively, as well as exclusively, upon the subject of treaties. Therefore, while the Constitution confides the treaty-making power to the Executive Department, it guards it from serious abuse by placing it under the ultimate superintendence of a select body of high character and high responsibility, the Senate. The President is the immediate author and finisher of all treaties, but no treaty becomes binding upon a country unless it receives the deliberate assent of two-thirds of the Senate.

Continuing, the Constitution provides that he (the President) "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

In construing these powers the supreme court has held that the nomination and appointment to an office are voluntary acts and distinct from the commissioning of such appointee. As a matter of fact, even after confirmation of an appointment by the Senate, the President may in his discretion withhold a commission; until a commission has been signed the appointment is not fully consummated. The Senate cannot originate an appointment; its constitutional action is confined to a simple affirmation or rejection of the President's nominations, and such nominations fall whenever it disagrees to them. The power of the President to appoint to office necessarily includes the power to remove all officers appointed and commissioned by him, where the Constitution has not otherwise provided. Therefore he may remove a territorial judge in his discretion.

The President is required to fill vacancies happening during the recess of the Senate by granting commissions which shall expire at the end of their next session.

Judicial Power.

The third article of the Constitution embraces the organization and powers of the Judicial Department. The judicial power is "vested in one supreme court and in such inferior courts as

the Congress may from time to time ordain and establish." The want of this power constituted one of the vital defects of the Articles of Confederation. Unless the government is provided with a Judicial Department with powers co-extensive with those of the Legislative Department, it must naturally be unsafe. As Montesquieu remarks, "there is no liberty, if the judiciary power be not separated from the legislative and executive powers." It cannot be doubted that personal security and private property rest entirely upon the wisdom, the stability and the integrity of the courts of justice. In a government such as ours, where there is an assemblage of republics combined under a common head, the necessity of some controlling judicial power to ascertain and enforce the power of the Union is apparent.

The jurisdiction of the courts of the United States depends exclusively on the Constitution and laws of the United States. The judiciary must decide upon the constitutionality of the acts and laws of the Federal and state governments. Congress, having the power to establish inferior courts, as a necessary consequence has the right to define their respective jurisdiction. With the exception of the creation of the supreme court, the power of Congress to create inferior courts and to confer upon them as much or as little jurisdiction pertaining to the Federal Government as it thinks best is unlimited.

Section 1 of Article III further provides that "the judges both of the supreme and inferior courts, shall hold their offices during good behavior; and shall at stated times receive for their services a compensation, which shall not be diminished during their continuance in office."

The Justices of the Supreme Court are expressly required to be appointed by the President, by and with the advice and consent of the Senate, as has been pointed out heretofore.

The judicial power is specifically outlined in Section 2 of Article III to "extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls, to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens or subjects."

Federal Jurisdiction.

A "case" arises, within the meaning of the Constitution whenever any question respecting the Constitution, laws or treaties of the United States has assumed such a form that the judicial power is capable of acting on it. By cases in law are to be understood suits in which legal rights are to be ascertained and determined in contradistinction to those where equitable rights alone are recognized, and equitable remedies administered. By cases in equity are to be understood suits in which relief was sought according to the principles and practice of the equity jurisdiction as established in English jurisprudence. The Federal courts have jurisdiction of all suits affecting public ministers, and the recognition of the Executive of the United States is conclusive as to the public character of the party.

The jurisdiction of the admiralty courts in this country at the time of the Revolution, and for a century before, was more extensive than that of the High Court of Admiralty in England. It is not limited to the particular subject over which it was exercised in the English courts of admiralty when the Federal Constitution was adopted; neither does it extend, under the Constitution and laws of Congress, to all cases which would fall within its cognizance, according to the civil law, and the practice and usages of Continental Europe. The supreme court has decided that the admiralty jurisdiction of the United States extends to the navigable lakes and rivers, without regard to the ebb and flow of the tide of the ocean. It embraces all maritime contracts wheresoever the same may be made or executed and whatever may be the form of the stipulation; and also all torts and injuries committed upon waters within the jurisdiction of the United States.

Among the enumerated powers of the judiciary is that relating to controversies to which the United States shall be a party. Congress never having authorized suits to be brought against the United States, no such action can be commenced or prosecuted. This does not prevent the exercise of appellate jurisdiction, to obtain by writ of error a reversal of judgment which has been rendered in favor of the United States. Nor does it preclude individuals, when sued by the United States, from availing themselves of credits or set-offs against the United States. Claims against the government are prosecuted through the Court of Claims. As stated in The Federalist, "it is a known maxim, justified by the general sense and practice of mankind, and recognized in the law of nations, that it is inherent in the nature of sovereignty not to be amenable to the suit of any private

person without its own consent." The citizens of the United States are not wholly destitute of remedy, in case the National Government should invade their rights, either by private injustice and injuries or by public oppression. In case the latter occurs the whole structure of the government is so organized as to afford redress by enabling the people to remove public officers who abuse their trust. Concerning private injustice and injuries the National Government is *per se* incapable of any personal wrong, such as assault and battery. Regarding injury to property, the remedy for such lies against the immediate wrongdoer, who may be sued, and who cannot shelter himself under any immunity of the government from responsibility. Consequently, if any agent of the government shall unjustly invade the property of a citizen under color of a public authority, he must, the same as any other violator of the laws, respond in damages. Of the remaining controversies, over which the judiciary of the United States has control, little need be said. Citizenship when spoken of in the Constitution in reference to the jurisdiction of the Federal courts, means nothing more than residence. A corporation created by and transacting business in a state is to be deemed an inhabitant of the state, capable of being treated as a citizen, for all purposes of suing and being sued. The judiciary act confines Federal jurisdiction, on the ground of citizenship, to cases where the suit is between a citizen of a state where the suit is brought, and the citizen of another state; a mere declaration of intention to become a citizen, under the naturalization laws, is not sufficient to prevent an alien from being regarded as a foreign subject, within the meaning of the Constitution.

Having concluded our brief review of the classes of cases to which the judicial power of the United States extends, the next inquiry presented is in what mode it is to be exercised and in what courts it is to be vested, the answer to which is contained in the succeeding clause of the Constitution, to wit, "In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

It is to be observed that by the above clause the original jurisdiction of the supreme court is very limited, and Congress cannot constitutionally confer on it any other or further original jurisdiction.

Trial by Jury.

An important safeguard to personal liberty is afforded by the provisions in the next clause of the Constitution, to the effect that all crimes shall be triable by a jury except in cases of impeachment. A trial by jury is generally understood to mean *ex vi termini*—a trial by a jury of twelve men, impartially selected, who must unanimously concur in the guilt of the accused before a legal conviction can be had. Any law, therefore, dispensing with any of these requisites may be considered unconstitutional. Such trial must be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as Congress may by law direct. The great object of trial by jury in criminal cases is to guard against a spirit of oppression on the part of rulers and a spirit of violence on the part of the people. This right constitutes one of the fundamental articles of Magna Charta, in which it is declared that no man shall be arrested, nor imprisoned, nor banished, nor deprived of life, liberty or property, but by the judgment of his peers or by the law of the land. The judgment of his peers here alluded to, and commonly called in the quaint language of former times a trial *per pais* or trial by the country, is the trial by jury, who are called the peers of the party accused, being of the like condition and equality in the state. When our ancestors came to America they brought this great privilege with them. It is now incorporated into all our state constitutions as a fundamental right, and, in the language of the supreme court, "the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms."

Treason.

Treason is regarded as the highest crime in civil society, since its aim is an overthrow of the government. Its tendency is to produce the greatest public alarm, and on this account it is peculiarly odious. It is, therefore, important to clearly understand what treason consists of, and in view of the history of England in dealing with treasons, actual and constructive, the framers of the Constitution determined to interpose an impassable barrier against arbitrary constructions either by the courts or by Congress, upon this crime. By the third section of Article III, treason is defined as follows: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person

shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

It has been held that a conspiracy to subvert the government by force is not treason. There must be an actual levying of war. An enlistment of men, who are not assembled, is not a levying of war within the meaning of the clause in question. In the famous trial of Aaron Burr it was held that no man can be convicted of treason who was not present when the war was levied. Congress is given the power under the Constitution to declare the punishment of treason, but no attainder of treason will work corruption of blood or forfeiture except during the life of the person attainted. The crime being of so serious a nature, it must be proven by two witnesses or a confession in open court.

The Fourth Article.

This concludes our inquiry into the organization and powers of the legislative, executive and judicial departments of our government. The remaining four articles of the Constitution, together with the amendments are none the less important and consequently a brief investigation of the construction placed upon their terms will be instructive.

Article IV provides that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. A judgment of a state court has the same credit, validity and effect, in every other court within the United States, which it had in the state where it was rendered. Such judgments, so far as the court rendering them had jurisdiction, are to have in all courts full faith and credit. They have not, however, full power and conclusive effect, but only such effect as they possessed in the state whence they were taken. Any state law which destroys the right of a party to enforce a judgment regularly obtained in another state is unconstitutional.

Section 2 of Article IV provides that the "citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." It is obvious that if the citizens of each state were to be deemed aliens to each other, they could not take or hold real estate, or other privileges, except as other aliens. The intention of this clause was to confer on them, if one may so say, a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances. What do we mean by the privileges and immunities of citizens of the several states? It would be more tedious than difficult to enumerate all, but they may be comprehended under the following general heads: Pro-

tection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole; the right of a citizen of one state to pass through or to reside in any other state, for the purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of every kind in the courts of the state; to take, hold and dispose of property, either real or personal, and an exemption from higher taxes or imposition than are paid by citizens of the other state. These and many others which may be mentioned are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state in every other state was manifestly calculated to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union. It should be borne in mind that this provision does not apply to corporations. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as the clause under consideration.

We were discussing the constitutional provision that citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. A citizen of the United States, residing in any state of the Union, is a citizen of that state. He is entitled to all the privileges of a citizen of that state, but does not carry with him any rights enjoyed under the laws of another state. It has been decided by our Federal courts that this clause has nothing to do with distinctions founded on domicile; such a person has the same right under the state laws which a native-born citizen domiciled elsewhere would have and no other rights. But since the adoption of the Fourteenth Amendment, one born or naturalized in the United States and subject to its jurisdiction is, without reference to state constitutions or laws, entitled to all the privileges and immunities secured by the Constitution to its citizens. Nevertheless a state law prohibiting marriage between negroes and white persons is not unconstitutional.

Fugitives.

To facilitate the administration of justice in the several states of the Union the succeeding two clauses of the Constitution were enacted, providing: "A person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the

executive authority of the state from which he fled, be delivered up, to be removed from the state having jurisdiction of the crime. No person held to service or labor in one state, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor but shall be delivered up, on claim of the party to whom such service or labor may be due."

It has been often made a question, says Story in his "Commentaries," how far any nation is by the law of nations, and independent of any treaty stipulations, bound to surrender upon demand fugitives from justice, who, having committed crime in another country, have fled thither for shelter. Mr. Chancellor Kent considers it clear upon principle, as well as authority, that every state is bound to deny an asylum to criminals and, upon application and due examination of the case, to surrender the fugitive to the foreign state where the crime has been committed. It is now settled that nations can only claim from each other the surrender of fugitives under treaty stipulations. Regardless of the international law on the subject it cannot be questioned that it is of vital importance to the public administration of criminal justice, and the security of the respective states, that criminals who have committed crimes therein should not find an asylum in other states, but should be surrendered up for trial and punishment. It discourages crimes, cuts off the chances from escape from punishment and promotes harmony and good feeling among the states. A fugitive from justice may be arrested and detained until a formal requisition can be made by the proper authority. The alleged crime must have been committed in the state from which the party is claimed to be a fugitive and he must be actually a fugitive from that state. It is not necessary that the crime charged should constitute an offense at the common law. It is enough that it is a crime against the laws of the state from which the fugitive fled.

The next clause above quoted was introduced into the Constitution solely for the benefit of the slave-holding states, to enable them to reclaim their fugitive slaves who escaped into other states where slavery was not tolerated. As slavery no longer exists it is not necessary to comment on this provision, but it is important to bear in mind that this clause includes apprentices.

Admission of New States.

The third section of Article IV regulates the manner in which new states shall be admitted into the Union and territories

governed to the following effect: "New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, nor parts of states, without the consent of the legislatures of the states concerned, as well as of the Congress. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property, belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state." The people of any territory may peaceably meet together in primary assemblies, or in conventions chosen for such assemblies, for the purpose of petitioning Congress to abrogate the territorial government, and to admit them into the Union as an independent state, and if they accompany their petition with a Constitution framed and agreed on by their primary assemblies, or by a convention of delegates chosen by such assemblies, there is no objection to their power to do so, nor to any measures which may be taken to collect the sense of the people in respect to it; provided such measures be prosecuted in a peaceable manner, in subordination to the existing government, and in subserviency to the power of Congress to adopt, reject or disregard them at their pleasure.

The supreme court has decided that the power of Congress to dispose of the public lands is not limited to making sales, but they may be leased. No property, however, belonging to the United States can be disposed of except by the authority of an act of Congress. The United States, under the present Constitution, cannot acquire territory to be held as a colony, to be governed at its will and pleasure. But it may acquire territory which, at the time, has not a population that fits it to become a state, and may govern it as a territory, until it has a population which, in the judgment of Congress, entitled it to be admitted as a state of the Union. During the time it remains a territory Congress may legislate over it, within the scope of its constitutional powers in relation to citizens of the United States. The territory thus acquired is acquired by the people of the United States, for their common and equal benefit.

Republican Form of Government Guaranteed.

The fourth section of Article IV provides that the United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature or of the execu-

tive (when the legislature cannot be convened), against domestic violence. Without a guarantee the assistance to be derived from the National Government, in repelling domestic danger which might threaten the existence of the state constitution, could not be demanded as a right from the National Government. The Federalist, in commenting upon this important clause, says: "Governments of dissimilar principles and forms have been found less adapted to a Federal coalition of any sort than those of a kindred nature." By virtue of this clause a state cannot exchange a republican for an anti-republican constitution, and before a state can be admitted into the Union it must submit a constitution in conformity with the principles of a republican form of government. Protection against domestic violence is added with equal propriety. Every pretext for intermeddling with the domestic concerns of any state, under color of protecting it against domestic violence, is taken away by that part of the provision which renders an application from the legislature or executive authority of the state endangered necessary to be made to the general government before its interference can be at all proper. This clause, however, becomes an immense acquisition of strength and additional force to the aid of any state government in case of an internal rebellion or insurrection against lawful authority.

Amendments.

Article V of the Constitution determines the mode in which amendments thereto may be made. "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided, that no amendment, which may be made prior to the year 1808 shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate." It is obvious that no human government can ever be perfect; and that it is impossible to foresee or guard against all the exigencies which may, in different ages, require different adaptations and modifications of powers to suit the various necessities of the people. Two methods of effecting amendments are provided for, to wit:

One at the instance of the government itself, through the instrumentality of Congress; the other at the instance of the states, through the instrumentality of a convention. Twelve of the amendments adopted were proposed by Congress, the balance by the second method. Ample time for deliberation, both in proposing and ratifying amendments, is given, and the system has proven very successful in operation.

The most important provisions of Article VI are, first, that the Constitution and laws of the United States shall be the supreme law of the land; and, second, that no religious test shall ever be required as a qualification to any office or public trust under the United States. A law by the very meaning of the term includes supremacy, and if individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. The clause mentioned only declares a truth which flows immediately and necessarily from the institution of a national government.

The restriction against any religious test as a qualification to office needs no comment. The religious history of England and other continental countries convinced the framers of our Constitution of the dangers of any alliance between church and state, and this clause was consequently inserted.

The seventh and last article of the Constitution provides that nine states must ratify the Constitution to make same effective.

Amendments to the Constitution.

Nineteen amendments to the Constitution have been made since its adoption. The first ten amendments were proposed by Congress at their first session in 1789. The eleventh was proposed in 1794; the twelfth in 1803; the thirteenth in 1865; the fourteenth in 1866; the fifteenth in 1869; the sixteenth February 25, 1913; the seventeenth May 31, 1913; the eighteenth January 29, 1919, and the nineteenth August 26, 1920.

The most general objection urged against the Constitution was that it did not contain a full Bill of Rights. A Bill of Rights has been defined as a freeman's title to protection, and constitutes a limitation upon the powers of government. Let us, therefore, enter upon a brief consideration of the amendments regarding subjects properly belonging to a Bill of Rights.

The first amendment, and perhaps the most important, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances."

The Constitution makes no provision for protecting the citizens of the respective states in their religious liberty; that is left to the state constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect on the states. The First Amendment deprived Congress of all legislative power over men's religious opinion; but left it free to reach practices which are in violation of social duties or subversive of good order; it may therefore prohibit polygamy in the territories, though the practice of it is alleged to be sanctioned by the religion of the inhabitants.

The next most important amendment was the Third, providing that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." This provision seems indispensable to the full enjoyment of the rights of personal security, personal liberty and private property.

The Fifth Amendment protects every citizen of the United States from being twice put in jeopardy of life or limb for the same offense, from being a witness in any criminal case against himself, and from being deprived of his life, liberty or property without due process of law. This amendment also provides that no person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury.

In all criminal prosecutions, under the provisions of the Sixth Amendment to the Constitution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law "and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

Any person charged with a crime in the courts of the United States has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses.

The right of trial by jury is preserved by the Seventh Amendment in all controversies where the amount involved shall exceed twenty dollars in value. By the terms of the Eighth Amendment excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. The Ninth Amendment reserves to the people all rights not specifically vested in the United States under the Constitution.

The Eleventh Amendment provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." The Twelfth Amendment regarding the election of the Executive has already been considered.

The Thirteenth, Fourteenth and Fifteenth Amendments were made necessary by the complications arising out of civil war troubles. These amendments abolish slavery, define citizenship, apportion Representatives, define disqualification for office and extend the right of suffrage to all citizens regardless of color or previous condition of servitude.

The Sixteenth Amendment, which became effective February 25, 1913, was passed for the purpose of enabling the government to tax incomes, the previous acts having been declared unconstitutional by the supreme court. The Sixteenth Amendment provides that Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census of enumeration.

The Seventeenth Amendment provides for the popular election of United States Senators, as the method provided by the original constitution of electing Senators by the legislatures of the several states was found in operation to be disadvantageous.

The Eighteenth Amendment was adopted January 29, 1919, and prohibits "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes."

The Nineteenth Amendment was adopted August 26, 1920, and provides that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

BANKS AND BANKING

Subjects Defined—Deposits—Loans and Discounts—Certified Checks —Officers and Agents—Savings Banks—Clearing House.

FROM a practical standpoint there is no subject of greater importance to the business public than that of banks and banking, and we will therefore direct our attention briefly to an inquiry of the general principles regulating this branch of business.

A bank has been legally defined as an institution for the deposit of money, with power to issue its promissory notes, intended to circulate as money (known as bank notes) or to receive the money of others on general deposit; to form a joint fund that shall be used by the institutiom for its own benefit, for one or more of the purposes of making temporary loans and discounts; of dealing in foreign and domestic bills of exchange, coin, bullion, credits, and the remission of money; and with privileges in addition to these powers of receiving deposits and making collections for the holders of negotiable paper. At common law banking is open to every individual and originally consisted only in receiving deposits, such as bullion, plate and the like, for safe keeping, until the depositor should see fit to draw it out for use; but the business was gradually extended to include the discounting of bills and notes and the loaning of money on mortgage, pawn, or other security, and in recent times to the issuing of notes of their own intended to circulate as currency or a medium of exchange instead of gold and silver.

As a matter of public protection, the legislatures of practically every state have forbidden individuals or firms from engaging in the banking business unless they conform to the particular laws relating thereto. In common parlance a bank is understood today to be a corporation authorized by either the National or State Government to conduct the banking business or the business of establishing a common fund for lending money, discounting notes, issuing bills, receiving deposits, collecting the money on notes deposited and negotiating bills of exchange. Should several individuals assume to engage in banking without complying with the law, hold meetings, elect directors and the like, they may be held civilly liable as partners and criminally liable as individuals.

A banking department is established by statute in every

state, the duties of which are to take care that the laws in relation to banks and banking companies, co-operative banking associations, trust, safe deposit, real estate, mortgage, title insurance, guarantee, surety and indemnity companies, and all other companies of a similar character, having power to receive money on deposit, shall be faithfully executed.

Deposits.

A bank is not bound to receive on deposit the money and funds of every person who offers, but may arbitrarily select its customers from among those that apply. Statutes in many states impose certain restrictions on this power of discrimination. Discounting or loaning money, with a deduction of the interest in advance, is a part of the general business of banking, and, although a bank is no more exempt from the operation of the usury laws than an individual, yet it has been held that taking the legal interest upon loans in advance is not usurious.

Deposits made with bankers are either general or special. A special deposit is where something is placed in the charge or custody of the bank, of which specific restitution must be made. A general deposit is said to amount to a mere loan, and the bank is to restore not the same money, but an equivalent sum, whenever it is demanded. As regards general deposits, the relation of banker and customer is that of debtor and creditor. But in the case of a special deposit the bank is merely the bailee of the depositor and has no authority to use the thing deposited. Where valuables are deposited as collateral for a loan, the bank is only bound to take ordinary care of them, and accordingly will not be held liable where burglars break in and steal the securities, in the absence of gross negligence.

It may be stated that a bank has a general lien on all moneys, funds and paper securities of a depositor in its possession for the amount of the general balance. A bank has the right to set off as against a deposit only where the individual who is both depositor and debtor stands in both these characters alike, in precisely the same relation toward the bank. Hence an individual deposit cannot be set off against a partnership debt.

A deposit in forged bills or counterfeit coin creates no indebtedness, although credited to the depositor's account; payment in such coin could not discharge a debt and cannot create one. A bank is bound to know its own notes, and where it receives and gives credit for notes purporting to be its own it cannot, after the lapse of a reasonable time, repudiate them on the ground that they were forged or fraudulently altered.

The entry in a bank book by the proper officer of the amount and date of the deposit is *prima facie* evidence that the bank received the amount and binds the bank the same as any other form of receipt. However, the entry is only a receipt, and is open to explanation, and if shown to be a mistake is no longer binding upon the bank. Likewise the receipt is open to correction by the depositor if shown to be erroneous.

A certificate of deposit is the written acknowledgment of the bank that it has received from a certain person a certain sum on deposit. Ordinarily it is a simple receipt of the bank, in negotiable form, for so many dollars, and has been held to be in fact equivalent to a promissory note.

The certifying of a check is in effect merely an acceptance and creates no trust in favor of the holder, and no lien on any particular assets of the bank which certifies it. In using deposits made for the purpose of having them applied to a particular purpose, the bank acts as the agent of the depositor, and if it failed to apply it at all, or misapply it, it can be recovered as a trust deposit. Deposits made by trustees, executors, administrators, etc., are regarded as general deposits, and if the bank fails to pay them, the beneficiaries have no peculiar claims or rights over other creditors. They must share like other general depositors. The deposit of mortgages and other special instruments for collection or the drawing of a draft on a debtor and giving it with specific instructions to collect and remit, constitute a trust transaction, and the money, if collected, becomes a trust fund, which must be paid in case of the failure of a bank before general depositors.

Trust Funds.

When commercial paper is received for collection a trust relation exists. This relation may be changed by agreement or custom into that of debtor and creditor after the collection of the proceeds, but a bank cannot divest itself of the trust relation at its own convenience.

Quite frequently trustees mingle a trust fund or several trust funds with their own deposit in an individual account. Such conduct, although criticised by the courts, is not in fact wrongful, and a bank, although knowing that this is done, is not at fault. The circumstance, however, is suspicious and should impel the institution to exercise caution in the payment of checks drawn against such mingled funds. If a bank learns that a trustee is committing a breach of trust by an improper withdrawal of funds or participates in the fraud, it becomes liable

The weight of authority throughout the United States is to the effect that if a bank receives a check payable to a depositor as a trustee and credits it to his personal account and permits him to draw it out on his personal check, it is liable with him for a breach of the trust.

The law presumes that a deposit belongs to the person in whose name it is entered, and the bank cannot question his right thereto. If a deposit in the name of one can be claimed by another, the burden of proof is on such other to establish his or her ownership. If, therefore, a deposit is attached either because its title is claimed by another or to secure a debt due from the depositor to the attaching creditor, the bank should do nothing until the court has made an order naming the person to whom the bank should pay.

A bank being in law a debtor, is absolutely liable for the loss of a general deposit, although such loss occur by events wholly beyond its control, but if the bank fail, a general depositor is not a preferred creditor in the absence of special statute.

Power to make collections upon business paper is incidental to the banking business. A bank upon accepting the agency for this purpose is bound to exercise reasonable care and diligence in the discharge of its assumed duties. The measure of damages resulting from its neglect of duty will be the amount of actual loss the party interested has sustained. When a bank receives a note for collection, it is bound to use reasonable skill and diligence in making the collection, and for that purpose is bound to make a reasonable demand on the promisor, and in case of dishonor to give due notice to the indorsers, so that the security of the holder shall not be lost or essentially impaired by the discharge of the indorsers. The bank must use due diligence in taking all necessary steps by presentment, demand, protest and notice, to fix the liability of all the parties to whom its principal has a right to resort for payment; and if the bank fail in any of these duties, it becomes liable in damages. Instructions given to a bank taking a note or bill for collection, where the collection is to be made in a distant place, must be transmitted to its correspondent. If a note is payable at the bank to which it is indorsed for collection no demand is necessary.

After collection, the bank may either keep the money separate from its other funds, as a special deposit, for which it will be liable as a mere bailee, after notice to the owner, or it may place the amount to the depositor's credit, and mingle it with its other funds, when it will be liable to the holder, as a simple contract debtor.

How far a bank is liable for the negligence of a correspondent bank to which it has sent commercial paper to be collected is a question upon which there is a great conflict of authority. It is held, on the one hand, that the bank first receiving the paper is answerable for the neglect, omission or other misconduct of the bank or agent it may employ, following the general rule of law that an agent is liable for the acts of a sub-agent employed by him. This is the doctrine established by the decisions of the Supreme Court of the United States and the courts of several other states. But it is held, on the other hand, that the liability of a bank taking a note or bill for collection which is payable at a distance extends merely to the selection of a suitable and competent agent at the place of payment, and to the transmission of the paper to such agent with proper instructions, and that the correspondent bank is the agent of the holder, and that the transmitting bank is not liable for the defaults of its correspondent when selected with due care. This doctrine has been adopted by the courts of Pennsylvania, and is approved by the leading text-book writers.

The Subject of Loans.

When a bank has issued a letter of credit to a correspondent bank announcing a credit for a stated sum for the use of the holder of the letter, it cannot, after learning of the insolvency of the bank to which the letter is directed, retain the funds for a debt due therefrom. A letter of credit is a guaranty, and a bank can ordinarily recover for all advances made thereon in good faith and within the terms of the letter of credit.

Loans and Discounts.

The majority of questions regarding the authority of banks to make loans resolve themselves into an interpretation of the charter organizing the bank or statutes regulating its operations. Power to lend must be defined by positive law, and, when no prohibitory statute exists, a commercial bank can lend money on real estate security, and a bank having authority to lend on public stocks, on bonds and mortgages, or on any other securities deemed ample by the board of directors, can also discount on commercial paper. The purchase of a promissory note for less than its face value is a discount, but one taken in payment of a pre-existing debt is not. It is well settled that when a note is purchased or discounted the bank does not become the owner until it has paid therefor, and until then its possession is a bailment, and it cannot apply the proceeds to extinguish other indebt-

edness of the borrower without his consent. However, if the borrower should fail before he draws his money the note can be tendered back and the money retained, and a bank will not be liable to the holder of a check representing the amount which was not presented before the holder's failure. In discounting a negotiable note a bank is not required to exercise care to ascertain whether there are equities or defenses.

If a bank is prohibited from lending to its officers, a loan to a firm, a member of which is a director of the bank, is not a violation of the law. But if the charter of a bank provides that only such loans can be made to directors as the by-laws shall authorize and a loan is made to a director without any by-law regulating the condition, the loan is void and the money cannot be recovered.

If a state lends money to a bank on bonds it has power to guarantee them. A person who has borrowed money from a bank cannot avoid payment on the ground that his loan was not made by a quorum of directors as required by law.

It is important to observe that a bank cannot lend its credit to another, or pledge its property to secure the debt of another, if it has no interest therein. When loans have been made by banks, which loans are unauthorized, the weight of authority is to the effect that such loans should be paid by the debtors and that the lenders who have offended in making such unauthorized loans should be punished in some other way than by withdrawing the aid of the court to enforce payment. Where money is left with a bank to be loaned, the bank is an agent and not a debtor, and if the money is loaned in good faith and the bank has exercised reasonable care it is not liable to the borrower should there be any loss. The courts have ruled that a banker who promises to exercise careful attention in conducting the business of his customers is bound to exercise the skill usually shown by a banker in loaning money for a customer, even though the service be rendered gratuitously; but a failure to inquire carefully into the condition of a borrower would not be negligence if he was generally believed to be solvent and an inquiry would have yielded no information.

Security for Loans.

Incidental to the power of discounting notes, etc., is the power to secure loans in any manner which is not prohibited by law. If a loan is illegal this fact will not affect the titles to the securities which were transferred as collateral for the loan. The borrower cannot, therefore, while retaining the money restrain

the bank from negotiating the securities or obtain their cancelation or returns.

If a draft is discounted by a bank to which a bill of lading, properly indorsed, is attached, a special property on the merchandise described in the bill of lading passes to the bank as security which is preserved until the draft is accepted and paid. In many states banks have been forbidden to loan money on the security of their own stock and where a statute declares that a bank shall not make a loan or discount on the pledge of its own stock, this means directly to the owner and does not forbid a discount to a third party who has no interest in the stock.

Banks are ordinarily permitted to take mortgages, to secure debts made either at the time or afterwards, and it can afterwards take such property to secure its debt either by foreclosure, by sale on execution, or by other process for the purpose of selling it at better advantage. A bank which is forbidden by its charter to deal or trade in anything except bills of exchange, etc., is not forbidden from taking an assignment of a mortgage to secure a debt due to the bank.

Authority is given in many states to a bank to take a mortgage on land to secure the payment of its stock, and such mortgages are regarded as prior to mortgages for loans, although both may be made in the same instrument. The transfer of bank stock subsequently to the transfer of real estate subject to a mortgage of this character does not affect the mortgage rights of the bank.

A note made in one state and discounted in another is governed by the law of the latter state. Regarding the interest or rate of discount which a bank may charge, it is governed by the same law as individuals. The laws relating to usury do not apply to the purchase and sale by a bank of promissory notes and other instruments. As a matter of fact, it has been held that a bank may take a note bearing more than the legal rate of interest as security for a prior debt, although this right is not at all free from doubt. A new note or bill given in renewal of an old note or balance tainted with usury, is usurious.

Checks.

Although it has been held that a depositor can withdraw his deposit without a written order, as a strict matter of right, it is the universal custom of banks to require a written order from the depositor. Until a check has been presented to a bank and payment refused and notice of dishonor given to the maker, the holder has no right of action. In view of the fact that a

check is a written contract, oral statements cannot be used as evidence to contradict or vary the check. However, as between the original parties to the check, such evidence may be given to solve any ambiguity, as, for example, to show what bank or person was intended, or to show in what capacity the drawer or maker signed. Where the amount stated in marginal figures differs from the words in the body of the check the latter will govern.

When the maker of a check has no funds in bank, or has withdrawn them, or has stopped payment of the check, notice of dishonor is unnecessary. The general rule of law is that the holder of a check cannot fasten liability on the maker until he has first presented the check to the bank (drawee) for payment, and has given prompt notice of dishonor.

It should be most carefully borne in mind that the holder of a check, in order to charge the drawer in case of a dishonor, must present the check for payment within a reasonable time, otherwise the delay is at the peril of the holder. What is a reasonable time will depend upon circumstances, and will, in many cases, depend upon the time, the mode, and the place of receiving a check, and upon the relations of the parties between whom the question arises. A majority of the states have enacted negotiable instrument acts which regulate this question. If the bank on which the check is drawn be in the same place where the payee received the check, it should be presented at once for payment within banking hours on the day it is received, or on the following day. If in the meantime the bank fails, the loss will be the maker's. A check is generally designed for immediate payment, and not for circulation; therefore it becomes the duty of the holder to present it for payment as soon as he reasonably may, and if he does not, he keeps it at his own peril. If the bank is not in the same place where the payee receives the check, then it must be forwarded by mail on the next secular day after it is received for presentment. If the person to whom it is forwarded presents it for payment on the day after it has reached him by due course of mail, it will be sufficient.

A check given in the ordinary course of business for a debt is not payment until it is paid. If payment is refused without the holder's fault or negligence, he may sue on the original indebtedness. The holder is merely the agent of the maker in getting the money to pay his debt. The acceptance of the check of a third party is regarded in the same manner.

A check may be either antedated or postdated. An antedated check is payable immediately. A postdated check, or

one which bears a date subsequent to that of its actual issue, is payable on or at any time after the day of its date. Checks are not payable in the order of priority in which they are given, but in the order of their presentation for payment. The rule is "First come, first served." If a postdated check falls due on Sunday or on a legal holiday, payment cannot be demanded until the day following, and if the bank pays it before that time, it acts at its peril. The presumption raised by a postdated check is that the maker has an inadequate fund in the bank at the time of giving it, but will have enough at the date of presentation. It is valid, but a bank ought not to pay it, if presented earlier, until the date mentioned; if it does the depositor can recover his money. If transferred by the holder to another for a good consideration before the date for demanding payment, he may recover of the maker, although there was no consideration for the check in the beginning.

A memorandum check is defined as a contract by which the maker engages to pay the *bona fide* holder absolutely, and not upon a condition to pay if the bank upon which it be drawn should not pay upon presentation at maturity, and if due notice of the presentation and non-payment should be given. The word "memorandum" written or printed upon the check describes the nature of the contract with precision. It is an express waiver on the part of the maker of the check of any objection against the claim of a *bona fide* holder that it had not been presented for payment, or if it were presented and not paid, that he had had no notice of the non-payment of the bank named therein. As between the bank and the payee a memorandum check is just like an ordinary check. The bank is not bound to pay any attention to the word "memorandum" or the abbreviation "Mem." written on the check, or to recognize any contract as implied by them between the maker and payee which gives to the check any peculiar character. It has been held in New York State, that the alleged custom of Wall Street that an ordinary check upon a bank is to be converted into something contrary to its legal effects by writing "Mem." in one corner thereof, amounts to nothing. In reality, according to very respectable authority, a memorandum check amounts to nothing more than an indication of an understanding that the check is not to be presented immediately for payment, so as to destroy the drawer's credit with the bank when he has not provided funds to meet same.

A check signed by an individual, with the word "Agent," "Treas.," or other descriptive term has sometimes been regarded

as his individual check, and he alone was held to be bound. However, by the modern doctrine, the courts look at the intent of the signer, and if he is in fact an agent, trustee or officer of some principal, the court will give that effect to them.

A bank must ascertain that the party presenting a check is the one entitled to receive payment, under penalty of refunding the amount either to the party really entitled or to the drawer. If a bank pays a forged check to a holder without fault, who, in ignorance of the fraud, pays value for it, the money cannot be recovered back. A partnership deposit cannot be drawn on the check of an individual partner.

The practice of certifying checks has grown out of the business needs of the country, and is now so thoroughly established that its legality cannot be questioned. It enables the holder to keep or convey the amounts specified with safety, and furthermore enables persons not well acquainted to deal promptly with each other, and avoids the delay and risks of receiving, counting and passing from hand to hand large sums of money. The certification of a check by a bank is equivalent to an acceptance of a bill for that amount and binds the bank to hold sufficient funds of the drawer to meet the check. The theory of the law is that where a check is certified to be good by a bank, the amount thereof is then charged to the account of the drawer in the bank certificate account. Every well-regulated bank adopts this practice to protect itself. It follows that after a check is certified the drawer of the check cannot draw out the funds then in the bank necessary to meet the certified check. That money is no longer his. In other words, a certificate that a check is "good" operates as an engagement of the bank to pay the debt as its own; the bank becomes the principal debtor and the drawer is discharged. The law of demand and notice has no application to certified checks, and the bank becomes so far the primary debtor that no delay, until the Statute of Limitations has released the certifying bank, will affect the obligation to pay the holder. No particular form of certification is necessary. Ordinarily the bank officer writes on the check the word "good" or its equivalent, and sometimes adds his name or initial.

If a bank certifies a check to be good by mistake, under the impression that the drawer had funds on deposit, and notifies the holder in sufficient time to prevent any loss in consequence of the error, the courts have held that the bank is discharged from liability on its certificate.

It is provided in the Negotiable Instrument Act, which has been adopted along uniform lines in a majority of the states, that a check does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check.

If the drawer should withdraw his deposit before the presentation of his check for payment, although after a reasonable time had elapsed for presenting it, he would still be liable. Nothing short of the retention of his deposit there until the bank's failure, or until the Statute of Limitations has released him, operates as a discharge of the debt. It sometimes happens that a deposit is insufficient to pay a check in full, in which event a bank may decline to pay it at all; although it may, if it wishes, credit the amount of such deposit on the check, though this is seldom done. If a bank pays a check to a holder who has committed no fraud, it cannot recover of the holder, if in fact there was not a sufficient deposit, in which case the bank must look to the drawer.

The law is well established to the effect that if a bank neglect or refuse to pay on the order of a depositor, where the latter has sufficient funds on deposit, the depositor can maintain an action against the bank for the money, and is entitled to recover substantial damages for such refusal. When a drawee bank (the bank on which a check is drawn) has paid a depositor's check by remitting the amount by draft in a letter mailed to the bank from which the check was received, and afterwards learns of the depositor's insolvency or the insufficiency of his deposit to cover his check, this is usually regarded as in legal effect a delivery to the sending bank and beyond the sender's recall.

As a general rule, the drawer of an uncertified check can revoke his order at any time before the bank's acceptance thereof, and the bank is bound by such revocation. In such case, however, the drawer is liable to the holder for the consequences of his conduct. Ordinarily the death of the maker of a check will operate as a revocation; but, notwithstanding this, if a bank pay a check after the drawer's death and before learning of the event, it is not liable. In those jurisdictions where a check is regarded as an assignment of the funds to the amount thereof, the death of the drawer would not be regarded as a revocation.

It is fraudulent for the drawer of a check to have it certified after he has become insolvent. If this is done, the certifying bank has a right to reclaim or countermand the payment of the check, unless it has been previously transferred to an innocent

holder. A *bona fide* holder of a check or other negotiable instrument which is transferable by delivery acquires a good title even from a thief or finder. A bank, consequently, is protected by the law in paying such a check or other commercial paper in the absence of notice.

In case a depositor is indebted to a bank and his deposit is sufficient to meet the obligation, and it has not been specifically appropriated by him to be held for a different purpose, the bank has a right to apply such deposit to the payment of the debt. The general lien of a bank upon a customer's deposits will not be recognized where the circumstances are inconsistent therewith. Thus, for example, where securities are lodged with the bank for a particular purpose, as where they are pledged as collateral to cover a particular loan or debt, they cannot be retained by the bank for the general balance or for the payment of other claims. A bank cannot apply a deposit to an indebtedness which has not matured. A bank that gives a customer credit to a specified amount, which is to be secured by collections, cannot divert and suspend payments made on other notes until the maturity of such credit.

Banking Regulations.

Statutory regulations for conducting the banking business may be supplemented by every bank with such other regulations, in harmony with law, as its interests may require. Such regulations or by-laws are regarded as a contract between the bank and its customers. The officers of the bank are presumed to know them and are bound thereby so far as they determine the relation between the bank and themselves. The stockholders likewise are presumed to know the by-laws of the bank. As a contract relation between bank and depositor exists, the terms of which are largely embodied in the by-laws of the bank, their alteration by the bank alone, without the consent of the depositor, is a somewhat arbitrary exercise of authority. Yet by-laws that provide for reasonable amendment, without consulting the bank's depositors, have on several occasions been declared valid.

Authority to make and amend by-laws vests in the stockholders of a bank, who in turn may delegate their authority to the directors.

Usage plays a very conspicuous part in the law of banking. It has no inflexible boundary; it may apply to a bank or to all banks of the community; it cannot be suddenly created nor, save by statutory change, suddenly disappear. Custom is a law established by long usage. A universal custom becomes common law.

No contract or agreement can modify a law, but where no principle of public policy is violated, parties are at liberty to forego the protection of the law. Statutory provision designed for the benefit of individuals may be waived; but, where the enactment is to secure general objects of policy or morals, no consent will render a non-compliance with the statute effectual.

Individuals living in the same community with banks are supposed to know bank usages, and are presumed to act accordingly in doing business with these institutions, whether they have actual knowledge of the existence of the usages prevailing among them or not. The general course of business in a community, including the universal practice of banks, is a matter of which the courts will take judicial notice.

Officers and Agents.

The manner of selecting the directors of a bank is generally controlled by its charter, but when they are once elected their authority continues until successors are chosen and duly qualified. The president and other executive officers of a bank are chosen by the directors. The election of an individual to the presidency or other office of a bank by a majority of the quorum of the board of directors is valid. Title to office vests as soon as the vote of the majority of the directors is declared. The directors of a bank ordinarily have authority to appoint special agents and they may also confer a special agency on the bank's regular officers. Statutes in most states require all bank officers to enter bonds. If an officer is promoted, thereby incurring greater responsibility and his bond is not changed, his sureties are released for any defalcation in the higher office.

The compensation of the principal officers of a bank is usually fixed by resolution or agreement of the directors, or by-laws of the stockholders. Unless thus fixed, they are entitled to no compensation for performing the ordinary duties of their office. When once fixed, no increase for a past service, however valuable, can be allowed, although this rule has been somewhat modified. A bank's president who is authorized to act as a receiver, is not thereby forbidden to thus act in his individual capacity; nor is he, when thus acting, obliged to account for his compensation to the bank on the ground that it is entitled to his entire service. Should a bank become insolvent and the president be appointed receiver, he cannot continue to draw his presidential salary, nor, in fact, can any of the officers continue to draw theirs. They can, however, prove their claims for salaries like other creditors.

Every bank officer, including every director, of course, is an

agent of the bank, and the acts of the directors are regarded as corporate acts, while the acts of other officers are governed by the general rules of agency. They have authority to act in accordance with the general usage, practice, and course of their business; and when thus acting they bind their bank in favor of third persons who have no knowledge of any narrower limitations of their powers. It has been held that a bank is liable for a loan obtained from another bank, although the officer who borrows the money acts without the knowledge of the other officials and appropriates the money to his own use. When the president of a bank acts in good faith in discounting paper he is not liable for the consequences, but he is liable if he lends to a minor or other person against whom payment cannot be enforced. A bank is not liable for slander consisting of unauthorized declarations of its cashier concerning the condition of the account of a customer.

The relationship existing between the directors and the stockholders of a bank is purely a trust relationship and the directors can only use the funds of the bank for legitimate banking purposes. The directors of a bank are bound to exercise ordinary skill and diligence, and are liable for losses resulting from mismanagement of the affairs and business of the bank, but for excusable mistakes concerning the law, and for errors of judgment, when acting in good faith, they are not liable. It is the duty of the board of directors to exercise a general supervision over the affairs of the bank, and to direct and control the action of its subordinate officers in all important transactions. The community has the right to assume that the directory of a bank does its duty, and to hold them personally liable for neglecting it. Their contract is not alone with the bank. They invite the public to deal with the bank, and when anyone accepts their invitation he has the right to expect reasonable diligence and good faith at their hands.

The president of a bank, by virtue of his office, has authority to take charge of the litigation of the bank, and may answer and defend suits against it and employ counsel in its behalf. In the absence of authority the president cannot dispose of the cash or credits of the bank for the purpose of settling the demands of its creditors.

The directors of a bank can act only as a board in conducting its business. Their separate assent to any action is not the assent of the corporation. The meetings of directors are largely regulated by statute and by-law. A long-established custom of holding meetings and transacting business at the bank during business hours whenever a sufficient number are present serves

as a standing notice to each director, and they can proceed to transact business unless a by-law prescribes a different course.

Directors of a bank often have a personal interest in business which as directors they are required to pass upon. A director of a corporation like any other trustee, is bound to act in the utmost good faith toward his beneficiary, and is forbidden to take part in any transaction concerning the trust in which he has an interest adverse to that of his beneficiary; but he is not absolutely precluded from dealing directly with the corporation of which he is director.

It has been held that should the president or other officer make a loan to himself, the knowledge of which should subsequently come to the directors and pass without objection, their silence would operate as a ratification.

A duty imposed upon the board of directors by statute to be personally performed cannot be delegated to a committee or agent of a bank. They may delegate certain powers by the enactment of a by-law or a resolution, and thereby confer executive authority upon a committee or an agent, but where the statute or charter of a corporation specifically defines an act or duty to be performed by the directors, they have no power to set aside the law, and appoint agents to do the very thing which the law requires them personally to perform. They cannot delegate to an officer of the bank sole authority to make discounts or, in other words, they cannot give unlimited power to an officer to loan funds of the bank to any person or persons who might make application therefor.

Directors as Trustees.

The directors are held by a majority of the courts at the present time to be the trustees of the funds and property of the banking corporation, and such funds cannot be loaned nor invested without authority of the board of directors, who are held responsible for them. Loans and discounts may be authorized, and the executive part of the business performed by the cashier, president, or other agent of the bank, but the officer has no inherent authority in the absence of a resolution or direction coming from the board of directors to make loans to any person or persons. The directors may, by a single resolution, authorize the cashier to make loans to a certain person, firm, or corporation, up to a certain amount, and in this manner delegate their authority, but beyond this it has been held that a general resolution passed by the board of directors authorizing the cashier to discount notes and make loans generally, to those making appli-

cation and desiring to borrow, is not within their power or authority. If loans have been made by an officer of the bank without authority obtained from the board of directors, they may afterward be ratified by the board and such ratification legalizes the act.

Discounting notes is the principal business of a bank; its resources almost entirely consist of its bills receivable. The deposits of the bank are placed with the bank by the depositors upon an implied theory that when an investment or loan is made, they are to be loaned and invested by the trustees or directors with reasonable care and diligence. The making of the investments for the bank is a duty belonging altogether to the board of directors. The directors are consequently precluded, by the acceptance of the trust, from making any use of their power or of the corporate property for their own advantage. The well-known and established rule of law is that the directors must manage the business of a bank as directed by the law and the bank's charter. If they fail to perform this duty in good faith they will be held liable for the losses to the stockholders and directors. Directors may commit the ministerial work of the bank to officers duly authorized to perform the same, but this does not absolve them from the duty of reasonable supervision or shield them from liability for the wrongdoing of such official, if, through gross inattention, the wrongdoing has escaped their notice

The general rule is that directors of banks are acting as trustees and as such are supposed to serve without compensation. A governing statute may allow them to regulate their own compensation, but in the absence of a statute or by-law their services are supposed to be gratuitous. They cannot vote themselves salaries, because such a resolution is void, being a promise without a consideration.

The Bank President.

The executive business of a bank is conducted by its president, vice-president, cashier and secretary. In some cases the president of a bank is expected to devote only a portion of his time to the business, and is not required to exercise the same degree of care and foresight as a president who is the real head and manager and who possesses all the authority of the cashier. He may, however, be authorized by the directors to do anything within the authority of the bank's charter except those positive requirements that are personal and cannot be delegated; but when he goes beyond the scope of his usual authority it must be

shown that in some way his act was authorized by the directors. The authority of the president during the cashier's absence has often been questioned, but custom ordinarily governs in such cases, and it may be stated generally that whatever the cashier can do the president can do during his absence.

The duties of a president, as his office indicates, are executive. He should preside at all meetings of the board of directors; he should frequently examine into the condition of the bank's affairs, making a searching and thorough examination, taking off a balance, counting the cash, and generally making a careful inspection of all the books. If this practice is maintained employees will seldom, if they are so inclined, attempt malfeasance. A bank that has for its president one that will faithfully follow this practice, if otherwise judiciously managed, should never be compelled to go into involuntary liquidation. His executive powers are limited by the charter and by-laws, but in the holding of the office he is regarded as having charge of the affairs of the bank. His acts must be authorized, acquiesced in, or subsequently ratified by the board of directors in order to bind the bank.

The president of a bank should not be permitted to borrow its funds without the consent of the finance committee, and in the absence of such a committee the loan should be passed upon by the board of directors.

The Cashier.

The cashier is the agent of the bank and not of the directors; his acts are binding on his bank, and those who deal with him are presumed to know the extent of his general powers. His conduct outside his official sphere which is not criminal or contrary to public policy, if known and accepted by the bank, is binding thereon; and, even though contrary to law, the bank is bound if the act done by the cashier was by the authority of the board of directors. The cashier of a bank is supposed to be the thermometer of the bank, and should be able to denote the condition and financial temperature of the same at any time. It should be his imperative duty to examine daily the balance books, and as frequently as possible inspect the work of clerks and keep himself informed concerning the business of the bank.

The duties of a cashier depend in a degree upon the conditions surrounding the bank. The location and volume of business which the bank has may enlarge or lessen the detail of labor and his responsibility. The Supreme Court of the United States has defined the powers and duties of the cashier of a bank as follows:

"The cashier is the executive officer, through whom the whole financial operations of a bank are conducted. He receives and pays out its moneys, collects and pays its debts and receives and transfers its commercial securities. Tellers and other subordinate officers may be appointed, but they are under his direction and are the arms by which designated portions of his vaious functions are discharged. A teller may be clothed with the power to certify checks, but this in itself would not affect the right of the cashier to do the same thing."

Although it is one of the usual powers of a cashier to certify checks, the certification of his own checks is utterly void, even though he has money to his credit in the bank covering the amount of the check. The fact that he has deposited the amount of the check does not authorize him to certify his own check. A cashier has the inherent power to buy and sell foreign or inland bills of exchange. Dealing in bills of exchange is a part of the business of banking, and it becomes the duty of the cashier in the purchase and sale of the same to indorse them over to the buyer. He is charged with the care and safekeeping of all the notes, bonds, bills and other securities and valuable papers belonging to the bank, and may, during the ordinary course of business, sell, transfer and dispose of the same, and it will be presumed until the contrary is shown that he sold the same on behalf of the bank and was authorized to do so by the directors, or that they ratified his acts. When a run occurs upon a bank the powers of the cashier in relation to the porperty of the bank are not changed or in any way affected. In such a crisis the cashier has the power to put into exercise every usage, custom and law in order to protect the interests of the bank and see that no depositor or creditor obtains a preferred position or right over another creditor equally entitled. A cashier may draw checks while away from the bank, and may also indorse papers while away from the bank. He may likewise pay or certify checks away from the bank. A cashier has no right by virtue of his office to compromise a claim of the bank or to execute a composition agreement and release therefor.

Paying and Receiving Tellers.

The functions of the tellers of a bank, both receiving and paying, are respectively to receive and pay out the moneys of the bank, and as a rule one cannot discharge the duties of the other. The paying teller is entrusted with the custody and disbursement of the funds of the bank. He must know the signatures of the bank's customers and be ready to decide upon the payment or refusal of all checks when presented. The teller has no authority

to make contracts for the bank, and when he attempts to do so, if the party dealing with him has knowledge of the fact that his position in the bank is that of a teller, the bank is not bound by the contract where the same is outside of his duty and authority. It is the duty of the paying teller when authorized to certify checks, unless such authority is strictly delegated to the cashier. A paying teller cannot be held liable for paying a raised check which, by ordinary care, careful scrutiny and inspection, could not be discovered. It is the duty of the paying teller, after the exchanges have been made at the clearing house, to examine carefully each check coming through the same before charging the same to the drawer's account. The paying teller should, before honoring a check, satisfy himself that there is no revocation not to pay previously entered with the bank by the maker. At the close of the day's business it is the duty of the teller to make proof of the day's transactions; his cash on hand, adding all checks paid, must agree with the cash received from the cashier at the beginning of business of that day.

It is the duty of the receiving teller of a bank not to receive or give credit to a depositor for money, checks or drafts which may be counterfeits or spurious. He is required to make a careful examination of each coin, banknote, check, draft or other instrument offered for deposit, and before acceptance, if in doubt as to their genuineness, apply the tests known to experts.

It is the duty of the note teller of a bank to receive the money for all promissory notes liquidated at the bank. At the close of each day's business the teller must account for the disposition of all notes received by him. All notes received by him which are payable at other places in the city are sent out by messenger for presentation and collection. When notes are paid certified checks or money should be demanded.

Savings Banks.

In order to stimulate the habit of saving among the poor, savings banks were organized. Originally these were mutual in principle and charitable in character. Savings banks are not formed primarily for the advantage and profit of the stockholders or corporators, but for the benefit of the depositors, and in this respect they differ radically from ordinary banks. Strictly speaking, they cannot be called charitable institutions. The chief business of a savings bank is to receive deposits, invest them in certain classes of securities and pay to depositors the amount due them as they from time to time demand. A savings bank has no authority to do a general banking business, not even to engage

in the business of discounting bank paper. It is no part of the business for which it is established to obtain a market value for or give a market value to the negotiable paper of persons or other corporations by guaranteeing or indorsing it. Its duty is to keep the moneys deposited with it safely invested, and not to hazard those moneys by assuming responsibility for the performance of the contracts of others. The investments which such institutions may make are prescribed by their charters or by general statute, and must, of course, be made in accordance therewith. There are also statutes in the various states regulating savings banks in regard to the reserve fund, the division of profits and other like matters.

Savings banks are of two classes—mutual associations and capital stock corporations. A mutual savings bank is organized without capital stock and for the sole purpose of accumulating, holding and loaning the funds of their members. They are institutions for the deposit and safekeeping of money, and the profits, if any, arising from the investment of such deposits, are annually or semi-annually paid to the depositors.

Where a statute authorizes the incorporation of such a savings bank, the law will not permit the bank to conduct any other than a savings bank business. When savings institutions are incorporated without capital stock they are merely places of deposit where money can be left to remain or to be taken out at the pleasure of the owner, and under such terms as may be stipulated in the by-laws and agreed upon between the parties. In such a case the assets consist in loans of money made by them for the benefit of the members or depositors from whom the money was derived. In case of loss, they have no property out of which it can be paid, and the loss is apportioned *pro rata* among the depositors.

A mutual savings bank upon receiving money may invest the same, but the securities taken are for the general benefit of all the depositors. After the necessary expenses are paid for its management, the interest received upon the investments must be ratably divided among the depositors. The trustees and officers, in the absence of fraud, have no personal liability.

Capital Stock Corporations.

Where a savings bank is incorporated with capital stock, the stock of the corporation becomes a security to the depositor in case of loss. The trustees or directors in a corporation organized with capital stock are also held bound by the same rules in relation to the funds entrusted to them as are the trustees in a mutual association.

The authorities are not agreed as to the precise legal relation existing between a savings bank and its depositors. By some the relation is held to be that of agent and principal; by others that of debtor and creditor. The view supported by the weight of authority is that the bank is a trustee for depositors. The doctrine established by the leading authorities is to the following effect: The rights of the depositors in a savings bank are of a twofold character. While the corporation is solvent and in operation, the depositors may be regarded solely in the light of creditors of the corporation; they may withdraw their deposits and claim interest, as provided in the charter and by-laws, and may enforce their rights by the usual remedies at law. But the depositors are in reality something different from ordinary creditors. They are joint beneficiaries of the corporate estate and occupy a position similar to that of stockholders in an ordinary corporation. The courts will recognize the true position of the depositors as they do the true position of the shareholders, whenever this becomes necessary for the protection and adjustment of their equitable rights.

A depositor in a mutual savings society is declared as holding the same relationship as stockholders in a capitalized bank, and may be held liable for his or her proportion of the losses if any exist at the time of winding up the affairs of the bank. A depositor in a capitalized savings bank has no liability at any time.

A savings bank may make such rules and regulations for the receiving and withdrawing of deposits as are reasonable, and such rules constitute the contract between the bank and the depositor, and are binding on both. Generally these rules are printed in the pass book given the depositor when the account is opened.

Savings banks generally require depositors to give notice of an intention to withdraw a deposit. This right may be waived by the bank. A rule that payments made to the person producing the pass book shall discharge the bank is usually adopted by institutions of the kind under discussion, and such a rule has been held by the courts to be reasonable, and discharges the bank when it has exercised care in paying, even though the presenter was a thief.

If a depositor loses his pass book he must furnish satisfactory proof of loss as well as indemnity before he can draw out any funds.

Officers' Duties and Liabilities.

The officers entrusted with the management of the affairs of a savings bank are held to the exercise of common care, prudence

and judgment. They cannot assume responsibilities nor enter into contracts or transactions so as to bind the bank, unless such acts are clearly incidental to the duties imposed upon them.

The chief managing officer of a savings bank is the treasurer, and when thus acting he has authority to collect the bank's debts, and to that end can conduct the bank's litigation; to extend the time for paying a debt; to take possession of land acquired under a mortgage; or to receive special deposits. He is specially authorized to sell and transfer stocks and mortgages, and his authority to indorse notes may be inferred from the conduct of the trustees without any express direction from them.

The general rule applying to the trustees and directors of savings banks is the same rule that applies to the directors of other banking institutions. If they invest their bank's funds on personal security, or in any other manner contrary to law, they render themselves liable.

The treasurer of a savings bank is an officer of much more limited powers than the cashier of a commercial bank. His duties more nearly resemble those of the paying and receiving tellers of banks.

A delivery of a savings bank deposit book by the depositor to a third person, with intent to make a gift of the deposit, constitutes a valid gift. If, however, the book is delivered merely for safekeeping, or for a purpose inconsistent with an intention to relinquish the control of the deposit or the depositor's interest in it, there is no gift.

Upon the insolvency of a savings bank, the assets become a trust fund to be managed for the benefit of the creditors. A general depositor cannot set off his deposit against a debt due from him to the bank; all he is entitled to is his just proportion of what remains at the final winding up of the institution.

Clearing House.

In connection with the subject of banks and banking, a definite knowledge of the functions of a clearing house is most important. A clearing house is a voluntary association of banks for the purpose of making exchange of notes, checks, bills and moneys and settlements between the banks, all of which must belong to the association. A clearing house is not a bank used for the purpose of receiving moneys or other securities on deposit. Neither does it do a discount business. It may be an incorporated body, composed of banks where such banks may become stockholders, but is usually an association of bankers for the purpose of making exchanges.

A clearing house, although occasionally issuing, certificates, which circulate to a limited extent and chiefly in discharging balances due from one bank to another, is not a bank. A clearing house due-bill is not a mere certificate of deposit, but is negotiable, like a check payable to bearer.

As matter of general information it may be stated that the idea of a clearing house originated in the city of Edinburgh, Scotland, but the earliest record of one is that of London, founded about 1775. Today clearing house associations exist in every large city in the country. The Clearing House Association of New York consists of the principal incorporated banks. Two clerks from each bank attend at the clearing house every morning, where one takes a position inside of a counter at a desk bearing the number of his bank, the other standing outside the counter and holding in his hand parcels containing the checks on each of the other banks, received the previous day. At the sound of a bell, the outside men begin to move, and at each desk they deposit the proper parcel, with an account of its contents, until, having walked around, they find themselves at their own desks again. At the end of this process the representative of each bank has handed to the representative of every other bank the demands against them, and received from each of the other banks their demands on his bank. A comparison of the amounts tells him at once whether he is to pay into or receive from the clearing house a balance in money. Balances are settled daily.

Rules and regulations made by a clearing house association must be reasonable and not in violation of any law, and, generally speaking, are practically the same throughout the country. Banks may make rules for securing the payment of balances that may be found due from one member to another; but the rules and usages of a clearing house are for the benefit of its members, and their customers can neither claim the benefit of nor be injured by them.

Members are permitted to clear for other banks or trust companies in the same city or vicinity, by complying with rules that are established for the protection of clearing house members. Such a contract between the two banks does not impose the same liability on the clearing house bank to pay the checks drawn on the other as the law imposes on the drawee bank itself. It has been held that the non-member is bound by the refunding of a check by the other, even though this be done later than the time fixed by the clearing house.

A settlement made by two banks through the clearing house, in which checks are presented and exchanged and the balance

between them is struck, will be final if either fails to give notice of maturity to meet the balance against it on the general adjustment before the hour when banks usually pass credit to the checks of their depositor. If by any mistake of fact a check so paid but not good was retained until after the hour fixed, the payment is held to be treated as payment made under a mistake of fact to the same extent and subject to the same right of reclamation as if it had been made without the intervention of the clearing house.

Another useful function of a clearing house is to give aid to its members in times of financial stringency by issuing clearing house certificates to meet the emergency. The value of this method was clearly demonstrated in the panic of 1907. These certificates extend the term of mutual credit involved in all clearing house settlements. They are not used as currency, but their effect is to add their face value to the volume of currency in circulation by releasing for use outside that which would otherwise have been reserved for clearing house settlements.

Federal Reserve System.

The subject of banks and banking cannot be properly concluded without a brief reference to the Federal Reserve Banking System recently put in operation by virtue of the act of Congress of December 23, 1913. The act is ultra-technical and we will therefore approach the subject from the standpoint of the business man, the bank customer, rather than that of the banker.

The title of the Federal Reserve Act, passed December 23, 1913, states its purpose as follows:

"An Act to provide for the establishment of Federal Reserve Banks, to furnish an elastic currency, to afford means for rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes."

However, in order to understand the place which the Federal Reserve Bank System is destined to occupy in the life of the nation, one must review, at least cursorily, the provisions of the system under which the national banks have operated for fifty years, and appreciate the fact that, in the new act, Congress sought to correct and supplement an existing system with which nearly two generations of our people have become familiar, rather than to supplant it with an entirely new system, built upon a new foundation. Furthermore, it is important to bear in mind that two-thirds of the banking of the country is done by banks and trust companies chartered by the various states, under laws differing rather widely and in some cases under charters much

less strict than the Federal law. This feature becomes of great importance when it is considered that the ultimate banking reserves of the country are the reserves of the national banks.

It is an elementary but important fact that the whole theory of banking is based on the principle of averages derived from the results of experience. Banks represent, roughly, two classes of customers, depositors and borrowers. If a bank had to keep in its vaults cash subject to instant demand by all its depositors, no bank could live except by borrowing from its neighbor banks; and if the demand were simultaneous the entire banking system would break down, because there is not sufficient currency to meet the demand. Banking, therefore, depends upon the hypothesis that a large portion of the funds of depositors will not be called upon simultaneously; that somewhere between 10 per cent and 25 per cent must be kept on hand and on the premises, and that the remainder can be actively employed at interest—that is, earning something; otherwise a bank could not earn its rent, salaries, and cost of operation, to say nothing of a return on the capital invested by its promoters. It is proper to explain that while a bank begins doing business by lending its capital and a share of its deposits, each loan that is made goes to swell the deposits because the loan when made is not usually paid out in cash, but is put as a deposit creditor to the borrower and subject, like any other deposit, to check by the borrower who has thereby become a depositor. The relationship of deposits to loans and to currency is well illustrated by the aggregate figures taken from a recent statement of the Comptroller of the Currency as follows: (The report includes all national banks and 95 per cent or more of the state banks, and trust companies) Gross deposits of individuals and corporations in national banks, state banks and trust companies, $18,517,732,879; gross loans and discounts by national banks, state banks and trust companies $15,288,357,284; total United States currency outstanding, same date $3,402,015,427.) This 10 to 25 per cent which experience has found must be retained in hand is called a Reserve, but the term has been more or less misused and misunderstood. We might assume, for example, that 10 per cent were the minimum percentage of cash which had to be kept in vault and that 25 per cent were the amount which, including this irreducible minimum, was required for emergencies. This is equivalent to saying that 10 per cent was the minimum requirement of normal conditions and that the 15 per cent additional was reserves. Under the Banking Law of 1864, reserves varying from 15 per cent to 25 per cent were stipulated, but unfortunately that law (which per-

mitted reserve cities to deposit half their reserves in central reserve cities, and country banks, three-fifth of their reserves in reserve cities) permitted a great duplication of reserves without any elasticity. A demand for currency attending a panic or loss of confidence on the part of the public invariably found the banks carrying the minimum reserves authorized under the law, and it would at once develop that these so-called reserves were not, in truth, reserves—they might more truly be called minimum requirements, not reserve funds, available to overcome a period of stress.

The subject of reserves thus became one of paramount importance, and it was recognized by many that a correct solution was of immense importance to the country's development. For twenty years bankers, business men and economists have interested themselves in the problem of working out a remedy. The fact that other countries were able to adjust their banking and currency methods to the ebb and flow of business, or even to survive considerable recessions without complete stagnation or panic was constantly referred to. After much discussion it became apparent that this question of reserves was closely associated with that of a suitable currency; that one of the phenomena attending every panic or business disturbance was a demand for currency which, if not satisfied, invariably led to the hoarding of metallic money. It was pointed out that in this respect the currency system of the United States, under the National Banking Act of 1863, was peculiarly rigid and inelastic—far more so than it had been under earlier banking acts or under the central bank systems common in Europe.

The currency provision of the law of 1863 was based on the idea of compelling national banks to purchase United States Government bonds and using those bonds as collateral security for national bank currency. As a plan to create a market for government bonds of which there was some three billions outstanding at the close of the Civil War the act was a great success. Under its provisions bonds which sold on a basis of more than 7 per cent reached a basis of less than 2 per cent. Nobody could complain that this form of currency was not safe. The complaint came only from the economists and the students of the problem, that it was incapable of expansion and contraction with the demands of business. If the amount were increased to take care of maximum requirements, there was no ready means, in periods of slack business, of contracting the amount of currency in circulation except by the clumsy method of returning the currency, redeeming the deposited bonds and converting these into cash again, a manifest impossi-

bility on any large scale, because United States bonds soon had acquired a market price by reason of their circulation privilege, far above their investment value. Our own experience in this country before the Civil War, as well as that of European nations, pointed out a remedy in basing the currency, not on long-time securities like government bonds, but on short-time loans of merchants, manufacturers, and agricultural producers, based upon and representing actual purchase and sale of raw material, produce or commodities, or of manufactured or partly manufactured products. The great advantage of such loans lay in the fact that they were self-liquidating, that they represented largely food or other products classed as necessities of life, that the paper was for short-time maturity, that in the nature of the case, currency based on such loans would increase or decrease in volume directly with the enlargement or diminution of trade requirements, population, etc. In order to leave undisturbed the existing currency, with which every one was familiar, Congress provided that the present bond-secured currency should remain practically intact or subject only to gradual replacement through a period of twenty years with a new bond-secured currency of the Federal Reserve banks. This means that the notes of twelve Federal Reserve banks will gradually displace the notes of 7,600 national banks. In addition to this currency, plus the gold and gold certificates; silver and silver certificates, and greenbacks, already in existence and which are enumerated in Table A, there was created by the Federal Reserve Act a new form of currency, known as Federal Reserve notes.

TABLE A.

In circulation February 1, 1915, gold coin (including bullion in treasury)	$623,050,364
Gold certificates	958,448,039
Standard silver dollars	67,621,922
Silver certificates	452,613,274
Subsidiary silver	160,334,776
Treasury notes of 1890	2,321,968
United States notes	319,711,226
National bank notes	879,497,881
Total	$3,463,599,450

N. B.—This table does not include any gold which is back of gold certificates, or silver back of silver certificates. In other words, there is no duplication in this statement.

These notes, issued in five denominations ($5, $10, $20, $50, $100), represent the elastic currency of the country. In other words, the previously issued currency already mentioned, amounting in total on February 1, 1915, to $3,463,599,450, will

easily take care of average requirements, while the new currency provides an elastic, supplementary currency. The plan devised and finally adopted by Congress not only meets the requirements of an elastic currency, but meets most ingeniously the difficulty in respect to reserves to which we have already referred. Depending somewhat on the diversity of business or the dependence of a community upon a single crop, there is to some extent a seasonal ebb and flow in the demands of every community, exhibiting itself in an increased or diminished demand for currency and banking credit.

The act provides for substantial reduction of reserves by country banks, reserve city banks and central reserve banks (as shown in Table B), but at the same time allows no duplication in its determination; a circumstance which, in the past, has led to much unsettlement and lack of confidence as to the ultimate security of the banks.

TABLE B.

Three central reserve cities (percentage of deposits required as reserves under the old law) 25 per cent; (percentage of active or demand deposits required as reserves under new law at end of three years) 18 per cent; (percentage of time deposits or savings deposits under new law) 5 per cent. Forty-nine reserve cities (percentage of deposits required as reserves under the old law) 25 per cent; of which one-half could be kept in a central reserve city (percentages of active or demand deposits required as reserved under new law at end of three years) 15 per cent; (percentage of time deposits or savings deposits under the new law) 5 per cent. Country banks (percentage of deposits required as reserves under the old law) 15 per cent, of which three-fifths could be kept in a reserve city (percentage of active or demand deposits required as reserves under new law at end of three years) 12 per cent; (percentage of time deposits or savings deposits under the new law) 5 per cent.

The act further provides that at the end of a period of three years, the percentages of total demand deposits required by the twelve Federal Reserve banks from member banks in central reserve and reserve cities and in the country, respectively, shall be 7 per cent, 6 per cent and 5 per cent, and at the option of member banks these deposits may be increased to 12 per cent, 10 per cent and 8 per cent, respectively. These reserves, instead of being held in vault as fixed cash reserves, subject to call on demand, are made the basis for issuance of the new Federal Reserve currency.

At first blush this might seem an indiscreet use to make of reserves; it might indeed strike one as a wild project of pyramiding on assets, but a study of the act will satisfy the student that if the Federal Reserve Board does its duty, these reserves can be used expansively as suggested, yet be absolutely safe. The law requires a cash reserve against deposits of member banks of 35 per cent; this requires, then, an aggregate cash reserve of $99,749,000. In respect to the issuance of currency, the law requires, first, that each of these twelve reserve banks (except for supervision by the Federal Reserve Board) shall be autonomous, self-contained and independent; that it may issue currency against approved "commercial paper" or "acceptances." (By "acceptances" are meant "drafts" or "bills of exchange" drawn upon a purchaser of goods to be delivered, growing out of export or import and accepted by the buyer or by the banker or accepting house, acting on behalf of the buyer.) When endorsed by member banks, dollar for dollar, provided it shall deposit as additional protection and reserve against such notes not less than 40 per cent of gold. From this it will be seen that after deducting $99,749,000 from the aggregate cash resources of the Federal Reserve banks as a reserve against member bank deposits, there remains $181,624,000 which would sustain a total reserve note currency of $454,060,000, and, obviously, this will increase to something like threefold this figure when all the reserves shall have been paid in; and still further increased if government deposits are made in the Federal Reserve banks, or if, as is to be hoped, state banks in large numbers enter the system.

It might be assumed from what has been said that these twelve Federal Reserve banks exist solely to take care of unusual, spasmodic, or seasonal demands of business, or else those excessive demands which periodically come upon us at greater intervals of time. That alone might well be called a worthy object to attain, but it would have to be admitted that a ponderous and costly machine had been created to serve an occasional demand; and it might be doubted whether a machine thus kept in comparative idleness through two-thirds of the year would operate smoothly and successfully when the steam was turned on. But the framers of the act had no such idea. They meant that these district banks should be active undertakings and, among other requirements, imposed upon them the duty of earning for their stockholders (the member banks aggregating to begin with 7,600) not only operating expenses and all costs by the government for engraving and printing of notes, the salaries and expenses of the Federal Reserve Board and its staff of employees but, in addition,

6 per cent on the investment by the banks. In order to enable the twelve reserve banks to employ their funds profitably in the dull season (the seasons of liquidation) and recognizing that in such seasons the member banks would not bring commercial paper to the reserve banks for rediscount and the issuance of currency, for the obvious reason that in those seasons the member banks themselves would have ample loanable funds, Congress provided for the purchase and sale of certain readily marketable investments, for example, government bonds, tax warrants of states, municipalities, etc., acceptances, *e. g.*, drafts or bills of exchange, the payment of which has been guaranteed or promised at maturity, and other similar documents. Investments of this kind which must be made under restrictions of the Federal Reserve Board are, with the exception of government bonds, all short-time paper, the idea being that they shall mature in advance of the active requirement of funds for crop moving, etc. It is impossible to foretell just what experience will develop, but it is probable that the rediscounting of commercial paper and the issue of Federal Reserve notes therefor will reach normally a minimum in the months of January to March, inclusive; that thereafter it will gradually rise to a maximum requirement in the autumn and from that minimum recede again to the low point after Christmas. However, it is to be expected that the demands in the various districts, with a diversity of harvesting seasons, will develop a condition where there may be a scarcity of funds in one region and a surplus in another. With this possibility in view, the act provides that the Reserve Bank of one district may rediscount for that of another district.

From the foregoing it may be seen that, while the Federal Reserve Act provides a valuable "shock absorber," it is far more than an inert piece of machinery which comes into action simply in an emergency. It might more truly be likened to an extra unit in a large power station, revolving at all times on, say half load, yet capable of taking on a full load at any time or, for short periods, even a considerable overload.

In much that has been said and written, however, it is evident that in some particular the true function of the Federal Reserve banks have been misunderstood. These great district banks, each representing a large and important territory, important though they may be as the central banks of their districts, are not in any sense wholesalers of money to their member banks who, in turn, dispense or retail it at a profit to their customers. These central banks, with whom the public is not directly permitted to deal, are in a sense "banks of banks" as has been fre-

quently said, but their gross assets really bear only a small ratio to that of the aggregate of the stockholding banks, and, while their powers and influence are very great, their actual currency issuing power will represent, after all the reserves have been paid in, only some 12 per cent to 15 per cent of total loanable funds of banks in the country, national and state. (Stated in round figures after deducting the reserves required against deposits, there remains $181,600,000 of gold on hand, which will sustain an issuance of four hundred and fifty-four millions of Federal Reserve notes. As already shown, this will be increased in three years to, say, $700,000,000, which is 4½ per cent of the total loans and discounts of the state and national banks of the country on June 30, 1914. This will be increased, as already explained, as state banks enter the system and as government deposits are added.)

The benefits of the Reserve Act as thus far developed are evidenced more by the indirect benefits derived than by the actual transactions of the Reserve banks themselves. For example, there was released on the 16th of November, 1915, when the banks were declared opened by the Secretary of the Treasury, something like $450,000,000 (the exact amount has not been determined on account of the difficulty of computation by reason of the duplications in previous methods of calculation). This large fund was released to meet the demands of business; its immediate effect was a reduction in all interest rates in every district. The emergency currency issued to meet the panic conditions brought on by the European War was rapidly retired so that, from a maximum issue of $385,216,655, this emergency currency outstanding has been reduced (at the close of business on the 13th day of February, 1916) to $44,205,802, and this is in spite of the fact that a large area of our country has suffered from a most serious setback due to the unexpected and sudden reduction in the demand of their chief staple product—cotton. As a precautionary measure, and on the advice of bankers quite generally, three years are provided in which to develop the Reserve banks to their full power. Whether or not this was an unnecessary length of time is a debatable subject, but one thing is already evident and that is that the country is demanding results as if three months instead of three years had been named.

In conclusion, let us refer briefly to some of the other functions of these Reserve banks. These lie chiefly in two directions; first, as government depositories and fiscal agents; second, as clearing houses for checks drawn within their districts, or, upon such plan as the Reserve Board may approve, between districts.

The act does not abolish the sub-treasuries, but at the same

time authorizes the Secretary of the Treasury to deposit and the Reserve banks to receive, government moneys and to act as fiscal agents of the government. It is for this reason chiefly that the Secretary of the Treasury is made *ex-officio* member of the Federal Reserve Board and its chairman, while the Comptroller of the Currency is also made an *ex-officio* member; thus giving the government a minimum representation on the board of two out of seven members. The framers of the act argued the propriety of this representation, in spite of the fact that the capital investment was made solely by the subscribing banks, not in order to give the Federal Reserve Board a political (*i. e.*, partisan) complexion, but on the ground that as the government was to be a large depositor, it should have an influential voice in the general supervision.

The argument in favor of the government thus using the Federal Reserve banks is strong; first, the general reason that the money of the people (the taxpayers) is retained where it will be most effective in promoting trade and commerce; second, that it is safe, because the integrity of the twelve reserve banks is assured by the guarantee, individual and collective, of all the member banks; lastly, that the function of fiscal or disbursing agent for all government drafts or checks, aggregating in round figures more than a million dollars per day, can be performed effectively by these banks and doubtless at a saving to the treasury (even after allowing for the interest paid by national banks on government deposits) compared with the costly and necessarily cumbersome method of remitting from the treasury or subtreasury to pay checks drawn on the Treasurer of the United States.

The second important function of the Reserve Bank outside of the chief functions for which it was created, is that of its place as a collecting agency or clearing house for checks of its respective district. All important cities of the country have had their clearing houses for checks of national and state banks in the community. These clearing houses, formed for mutual convenience by voluntary action of their component banks, have developed important functions quite outside of those originally contemplated. Among these may be mentioned a system of self-examination more rigid and thorough than that previously maintained by the government; agreed rules for charges for collections on out-of-town checks, and, in times of panic, such as 1907 and 1914, the rediscount of papers and securities of its members, issuing against these, clearing house certificates, which have been used not only in transactions between banks, but in some cases even in public transactions.

There is little doubt that this development of the clearing houses, adjusting themselves as they have, through many years of experience, to the demands of business, provided a valuable and effective suggestion to the framers of the Federal Reserve Law. So it is not to be wondered at that the Federal Reserve Act, in adopting the emergency function of the clearing houses in the rediscount of member banks' paper, saw the desirability of adopting, at the same time, the chief feature of these clearing houses, namely, the check clearing idea. And so, in fact, the act did embody, not in the most lucid terms, but certainly by intent, a complete system of clearings within and finally between the districts, subject to the rules to be framed by the Reserve Board, and, at the same time, authorized the Reserve Board, in co-operation with the Comptroller of the Currency, to raise the standard of the examination system coordinate with the examination by the Federal Reserve banks and by the Federal Reserve Board.

The reason the Federal Bank System is great, is that it has been evolved by the patient study and adaptation of our own best banking experience, the experience of Europe, the clearing house certificate plan, all ingeniously engrafted upon an existing national banking and currency system with which the country was familiar. The result is a system far better suited to American needs and American methods and prejudices than a central bank or a branch bank system.

We have created under this act twelve central banks, each as nearly as possible autonomous, but each under central supervision of the Federal Reserve Board, on matters of joint and common interest. If the plan works out in practice as well as it should; if the Federal Reserve Board does its full duty; if petty or partisan politics are laid aside, we shall have reached one ideal of scientific management—"local self-government and centralized supervision;" we shall have accomplished the object of all good organization—local incentive and enthusiasm with only enough centralized supervision to compare results; to measure men, methods and costs; and to ensure the necessary co-operation of all matters where joint co-operation is necessary, either for the good of the country or of the banks themselves.

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